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In The

Supreme Court of the United States

SHELDON PETERS WOLFCHILD, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A Court of Appeals for the Federal Circuit decision illuminates post-*Carcieri* conflicts with the Eighth Circuit, Ninth Circuit, the Federal Circuit itself and the Supreme Court regarding federal court subject matter jurisdiction over Indian claims of statutory violations against the United States. On the one hand, decisions such as *Carcieri v. Salazar*, ___ U.S. ___, 129 S.Ct. 1058 (Feb. 24, 2009) reflect that subject matter jurisdiction exists over federal government statutory violations on matters involving tribal governments recognized after the 1934 Indian Reorganization Act. *Carcieri* is in accord with Ninth Circuit decisions that an Indian tribe's sovereignty does not prevent the federal government from exercising superior federal sovereign powers. *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986). On the other hand, the Federal Circuit and the Eighth Circuit deny federal court subject matter jurisdiction to enforce federal statutory obligations and legal rights to individual Native American beneficiaries when post-1934 IRA non-tribal community governments are involved. *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009); *Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996).

1. After *Carcieri*, whether federal court subject matter jurisdiction exists over Native American beneficiary claims of purported federal government violations of the 1934 IRA or other applicable federal statutes when post-1934 IRA non-tribal community governments are involved.

QUESTIONS PRESENTED – Continued

2. Whether the Federal Circuit's holding of "statutory use restrictions" in Congressional Appropriation Acts establishing statutory obligations on the United States, but no "trust," departs from applicable statutory interpretation and trust principles set forth in *United States v. Mitchell*, 463 U.S. 206 (1983) and its progeny.

3. Whether the Federal Circuit's holding that a 1980 Congressional Act terminated a trust impermissibly conflicts with the First Circuit's decision in *Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1979) in that the Federal Circuit failed to consider the 1934 IRA's extension of all Native American trusts under 25 U.S.C. § 462 and failed to apply the "clear and unambiguous requirement" for a trust termination act.

LIST OF PARTIES

A list of parties has been provided to the Clerk of Court for the Supreme Court under a separate filing due to the numerous Petitioners represented (in excess of 10,790 individuals).

CORPORATE DISCLOSURE STATEMENT

The Petitioners are not and do not represent a nongovernmental corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, sitting as a three-judge panel, is reported at 559 F.3d 1228 (Fed. Cir. 2009) and is reprinted in the Appendix to the petition at Appendix 1. The court reversed and remanded the decision of the United States Court of Federal Claims reported at 62 Fed. Cl. 521 (2004) at Appendix 161.

JURISDICTION

The date of the Court of Appeals for the Federal Circuit decision was March 10, 2009 at Appendix 1.

A timely petition for rehearing and en banc review was denied on the following date: June 11, 2009. A copy of the order denying rehearing and en banc review appears at Appendix 112-15.

An extension of time to file the petition for a writ of certiorari was granted to and including November 6, 2009 on August 20, 2009, in Application No. 09A192.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the 1888, 1889, and 1890 Appropriation Acts: Act of June 29, 1888, 25 Stat. 217 at 228; Act of Mar. 2, 1889, 25 Stat. 980 at 992; Act of Aug. 19, 1890, 26 Stat. 336 at 349. The Appropriation Acts are reprinted at Appendix 154-56. Relevant provisions of the original Indian Reorganization Act of 1934, as amended, 25 U.S.C. §§ 462, 463, 465, and 479 are reprinted at Appendix 159-60. The Act of Dec. 19, 1980, Pub. L. 9-557, 94 Stat. 3262 is reprinted at Appendix 157-58.

STATEMENT OF THE CASE

This petition places squarely before the Court several issues of national importance arising from a split in circuit court decisions. With the Federal Circuit's holding in *Wolfchild v. United States,*[1] this petition presents a confluence of conflicting court decisions from not only the United States Court of Appeals for the Federal Circuit, the Eighth Circuit, and Ninth Circuit,[2] but also with the Supreme Court.[3] In light of this Court's recent holding in *Carcieri v.*

[1] 559 F.3d 1228 (Fed. Cir. 2009), App. 1.

[2] U.S. Sup. Ct. Rule 10(a).

[3] U.S. Sup. Ct. Rule 10(c).

Salazar[4] and the circuit splits, the Federal Circuit's *Wolfchild* decision highlights an apparent fundamental legal and jurisdictional shift of federal court jurisdiction and Indian trust law.

First, the consequences of the Federal Circuit decision and resulting circuit splits dramatically change the legal framework in holding the United States accountable for legal violations and injustices regarding Native Americans. It places all Native Americans in the untenable position of losing federal court forums to litigate federal obligations to them and other statutory claims or abuses by post-1934 Indian Reorganization Act[5] communities. In short, if the purported governmental violations involve post-1934 IRA non-tribal community governments, when the lands are held in trust for those IRA communities, affected Native Americans have no federal court remedy.

Second, with the Federal Circuit's disregard of the Supreme Court's holding in *Carcieri*, the Circuit's decision affects Native American rights nationwide in matters involving federal holdings of trust lands. In the instant matter, the United States purchased lands and held them for the use of a statutorily-defined "band" of Native Americans – the 1886 Mdewakanton.

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[4] *Carcieri v. Salazar*, ___ U.S. ___, 129 S.Ct. 1058 (Feb. 24, 2009).

[5] Pub. L. 73-383, 48 Stat. 984 (1934) ("1934 IRA").

The United States later abrogated those obligations and now holds the same lands *in trust* to another group of Native Americans – Indian communities created after the passage of the 1934 IRA. Those post-1934 IRA non-tribal community governments exclude the original Congressionally-intended beneficiaries from any benefits to or derived from the lands held in trust for them. The Federal Circuit decision suggests – in contradiction of the IRA, 25 U.S.C. § 462 – that the Department of Interior does not need express statutory authorization before replacing Native American beneficiaries on Indian trust lands.

Third, both the Federal Circuit and the Eighth Circuit suggest that, if the United States' obligations to a definitive class of Native Americans affect present-day post-1934 IRA non-tribal community governments, the federal courts have no subject matter jurisdiction to adjudicate the federal claims of the affected class because of the "Indian sovereignty" of the post-1934 non-tribal community governments.

In this case, the benefits derived from lands appropriated for an identified band of 1886 Mdewakanton Indians and their descendants presently go only to members of post-1934 IRA non-tribal community governments – to the exclusion of all other 1886 Mdewakanton who Congress originally intended. The Federal Circuit and Eighth Circuit decisions, as applied, leave these excluded Native American beneficiaries with no judiciable remedy for statutory claims or violations under the 1934 IRA because of the lack of federal subject matter jurisdiction.

Fourth, the Federal Circuit and Eighth Circuit suggest a judicial reluctance to assert subject matter jurisdiction, despite claims solely against the United States, if the judgment would require some redistribution of wealth of post-1934 IRA non-tribal communities to include the Congressionally-intended beneficiary class. To the contrary, federal courts should not rely on purported "Indian sovereignty" of post-1934 IRA non-tribal community governments to judicially excuse the United States from complying with and enforcing all applicable federal laws.

After *Carcieri*, do federal courts have subject matter jurisdiction over Indian claims against the United States for violations of the IRA, Congressional Acts, and other applicable federal statutes when post-1934 IRA non-tribal community governments are involved? *Carcieri* suggests the federal courts have such subject matter jurisdiction. The Eighth Circuit decision in *Smith v. Babbitt*[6] states the opposite. The Federal Circuit decision appears to fall in line with *Smith v. Babbitt*. But, the Ninth Circuit in two different types of cases, *United States v. Yakima Tribal Court*[7] and *United States v. White Mountain Apache Tribe*,[8] have found subject matter jurisdiction to enforce federal statutory obligations involving Native American tribes.

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[6] *Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996), *cert. denied sub nom., Freezor v. Babbitt*, 522 U.S. 807 (1997).

[7] 806 F.2d 853, 861 (9th Cir. 1986).

[8] 784 F.2d 917, 919 (9th Cir. 1986).

The Federal Circuit found, for the first time ever, Native American non-trust "statutory use restrictions" as possible substantive rights, but without providing a legal forum for adjudication as applied when post-1934 IRA non-tribal community governments are involved.

Fifth, the Federal Circuit's decision renounced settled principles of statutory interpretation governing Indian trust law creation. The Circuit required Congressional Acts to include explicit words such as "trust" or "reservation" to create trust obligations. The Federal Circuit's decision has now created a new restriction on Congress' ability to create trusts not acknowledged by this Court.

Sixth, the Federal Circuit also rejected settled principles of statutory interpretation governing Indian trust law termination. The court did not properly apply the Plain Meaning Rule to a Congressional Act passed in 1980, construing it as a trust termination Act. The Act did not contain the words expressing a purpose to terminate Indian trust beneficiary rights. The Federal Circuit decision did not consider and apply provisions of the IRA, specifically 25 U.S.C. § 462, which continues the terms of all Indian trusts in perpetuity unless Congress "directs" otherwise.

The Federal Circuit did not apply the "plain and unambiguous" requirement followed by the First Circuit when determining whether a Congressional Act terminates an Indian trust. In light of the Federal Circuit's decision, what statutory interpretative

principles now apply to interpreting Congressional acts purporting to terminate Indian trust beneficiary rights?

Finally, with the Federal Circuit's demand that Congressional Acts have specific language such as "trust" or "reservation" to create trust obligations between Native Americans or Native American tribes and the United States, has the statutory interpretative principles of the Supreme Court been eviscerated, undermined, or modified beyond *Mitchell II*[9] and its progeny, including this Court's most recent pronouncement under *Navajo II*?[10]

The implications of the doctrinal shift by the Federal Circuit's decision are far reaching. The federal jurisdictional conundrum for Native Americans, and the Circuit's restrictive framework and misapplication of Indian trust law interpretation represents the need for a definitive resolution by this Court.

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[9] *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*").

[10] *United States v. Navajo Nation*, ___ U.S. ___, 129 S.Ct. 1547, 1552 (Apr. 6, 2009) ("*Navajo II*").

A. The Underlying Facts[11]

1. An Indian conflict resulted in harsh Congressional reaction, but to those who remained loyal to the United States, promises of land.

After an 1862 Sioux uprising in Minnesota, Congress in 1863 passed an Act that "abrogated and annulled" all treaties between the federal government and Minnesota Sioux Indians and "forfeited to the United States" " . . . all lands and rights of occupancy within the State of Minnesota. . . ."[12] The federal government removed all Sioux from Minnesota with the exception of about 200 Mdewakanton Sioux who helped rescue whites during the 1862 uprising.

The reward for rescuing whites included "eighty acres in severalty to each individual of the beforenamed bands who exerted himself in rescuing whites from the late massacre of said Indians [as] an inheritance to said Indians and their heirs forever." The 80-acre parcels described in the 1863 Act were never set aside and the 200 or so loyal Mdewakanton remained without land in Minnesota for 25 years.

Finally, through Appropriation Acts in 1888, 1889, and 1890 ("Appropriation Acts"), Congress

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[11] The trial court's opinions contain a thorough canvass of the complex factual and legal background of this case. *See Wolfchild I,* 62 Fed. Cl. at 526-35, App. 161 and *Wolfchild v. United States,* 68 Fed. Cl. 779, 782-83, 785-94 (2005) ("*Wolfchild II*").

[12] Act of Feb. 16, 1863, 12 Stat. 652.

authorized the Secretary of the Interior to purchase land and other needed items for the loyal Mdewakanton in such a manner as the Secretary deemed best and to ensure that each Indian beneficiary receive "an equal amount in the value of the appropriation":

> [. . .] thousand dollars, to be expended by the Secretary of the Interior as follows . . . And all of said money which is to be expended for lands . . . shall be so expended that each of the Indians in this paragraph shall receive, as nearly as practicable, an equal amount in the value of the appropriation.[13]

Interior used $15,529.22 of the $40,000.00 of appropriated moneys to purchase "lands" in Minnesota – "the 1886 lands."[14]

The lands are acknowledged by all parties to be currently *held in trust* by the United States.

The Acts identified the Mdewakanton Indians for whom "each Indian" would receive the benefit of the land purchased as the 1886 Mdewakanton:

> For the support of the full and mixed blood Indians in Minnesota heretofore belonging to the Medawakanton (sic) band of Sioux Indians, who have resided in said State since

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[13] App. 154-55.

[14] The appropriated lands are "commonly called the '1886 lands' to reflect the effective date of the census that defined the beneficiaries." *Wolfchild I*, 62 Fed. Cl. at 528, App. 179.

> the twentieth day of May, eighteen hundred and eighty-six, or who were engaged in removing to said State, and have since resided therein, and have severed their tribal relations . . . as may be deemed best for these Indians or family thereof . . . [15]

A May 20, 1886 census published in September 1886 (prior to enactment of the Appropriation Acts), later supplemented in 1889, identified the Mdewakanton beneficiaries of the Appropriation Acts. The U.S. Court of Federal Claims found the 1886 census as the "presumptive starting point for indentifying the loyal Mdewakanton and their descendants"[16] – the "1886 Mdewakanton."

Interior purchased the 1886 lands in three different Minnesota locations and implemented a land assignment system for individual 1886 Mdewakanton. The assignments, made through land certificates, stated the 1886 lands as "held in trust by the Secretary of the Interior for the exclusive use and benefit of said Indian . . . [and] subject to [re]assignment by the Secretary of the Interior to some other Indian who was a resident of Minnesota on May 20, 1886 or a

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[15] App. 155; Act of Aug. 19, 1890, ch. 807, 26 Stat. 336 at 349. The two previous Appropriation Acts, used the same date of May 20, 1886, but the language to identify the 1886 Mdewakanton differed slightly: The 1888 and 1889 Acts identified the Mdewakanton as "full-blood." Act of June 29, 1888, ch. 503, 25 Stat. 217 at 228; Act of Mar. 2, 1889, ch. 412, 25 Stat. 980 at 992, App. 154-55.

[16] *Wolfchild II*, 68 Fed. Cl. at 787 n. 10.

legal descendant of such resident Indian."[17] Interior's land assignment system remained essentially in place for approximately 90 years until 1980 – being often referred to by Interior as an implementation of its "trust" obligations to the 1886 Mdewakanton.[18]

2. The 1934 IRA Preserved 1886 Mdewakanton Rights and Allowed the Creation of Post-1934 IRA Non-tribal Community Governments, But the Communities' Constitutions Subsequently Jeopardized 1886 Mdewakanton Rights to 1886 Lands.

(a) The 1936 post-1934 IRA non-tribal community governments.

When Congress enacted the Indian Reorganization Act in 1934, it preserved "existing periods of trust placed upon any Indian lands . . . until otherwise directed by Congress."[19] The IRA further provided that if the Secretary restores surplus lands to "tribal ownership" the pre-existing "rights or claims of any persons to [such] lands . . . shall not be affected by this Act."[20] Recognizing an opportunity, 1886 Mdewakanton leaders sought to bring all 1886 Mdewakanton under one political government, despite the

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[17] *E.g.*, JA2011 ("JA" refers to Federal Circuit joint appendix submissions).

[18] *Wolfchild*, 559 F.3d at 1248, App. 45.

[19] 25 U.S.C. § 462.

[20] 25 U.S.C. § 463.

fact the Secretary of the Interior purchased the 1886 lands in three separate Minnesota locations.

Interior denied the suggested governance as impractical resulting in the creation of three separate non-tribal political governmental entities, two in 1936, and one in 1969 – the Prairie Island Indian Community (1936), the Lower Sioux Indian Community (1936), and the Shakopee Mdewakanton Sioux Community (1969) (the "Communities"). "Non-tribal" refers to the fact that the Mdewakanton could not be recognized as a "historical tribe" due to both 1863 Act and Appropriation Acts' requirements to sever tribal relations.[21]

IRA provisions, however, allowed non-tribal Native Americans to form political governments based on "residence on reservation land."[22] Here, the territorial provisions of the Lower Sioux and Prairie Island Constitutions find the 1886 lands, reserved for the exclusive use of the 1886 Mdewakanton, as the Communities' original land base.

Interior guided, drafted, and approved the Communities' constitutions' content. The two 1936 constitutions followed the IRA "trust" directives. The 1969 constitution did not.

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[21] App. 117-19; JA4656; JA4659-60.

[22] 25 U.S.C. § 476 (prior to amendments in Pub. L. 100-581, Stat. 2938-39 (1988) which contained relevant savings clause at § 103).

For instance, the 1936 community constitutions incorporated and continued Interior's land assignment system preserving the 1886 Mdewakanton descendants' right to "receive an equal amount in the value of" as the Appropriation Acts directed:

- "Nothing . . . [would]be construed to deprive any Minnesota Mdewakanton Sioux of any vested right;"[23]
- That land assignments be made only to "the Mdewakanton Sioux residing in the State of Minnesota on May 20, 1886, and their descendants"[24] whether residents or not within the geographic political boundaries of each Community;[25]

As highlighted by the Federal Circuit, an Interior Solicitor's 1974 opinion letter concluded that the 1886 lands were best viewed held by the United States in trust for 1886 Mdewakanton, with Interior's Secretary "possessing a special power of appointment among members of a definite class" and with the authority to grant an interest in the form of either a tenancy at will or a defeasible interest in the land.[26]

A 1978 Interior memorandum confirmed the 1886 Mdewakanton descendants as beneficiaries of the

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[23] JA1952-57; JA1989-97.

[24] JA1955; JA1995.

[25] *Id.* Act of Mar. 2, 1889, 25 Stat. at 992, and Act of Aug. 19, 1890, 26 Stat. at 349, App. 155.

[26] *Wolfchild*, 559 F.3d at 1248, App. 46.

1886 lands, not the post-1934 IRA non-tribal community governments:

> It should be stressed that none of the three Community governments, organized under the Indian Reorganization Act and operating under Constitution and bylaws, has any right, title or interest in these lands. The land is held for the benefit of a specific class of people and their descendants.[27]

(b) The 1969 post-1934 non-tribal IRA community.

In 1969, the Department of the Interior, at the center of organizing the Shakopee Community, allowed for the Community's malformation through the acceptance of both 1886 Mdewakanton and non-1886 Mdewakanton as charter and community members. Interior accepted the status of the non-1886 Mdewakanton, knowing the land base for the Community rested entirely on 1886 lands – lands that were for the exclusive use of 1886 Mdewakanton and their descendents. Consequently, the Shakopee constitution would have no provisions to protect the rights of the 1886 Mdewakanton and their descendants' rights to 1886 lands.

Eventually, all *three* Communities closed membership to other 1886 Mdewakanton depriving them

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[27] JA399-400.

of receiving acquired benefits derived from the 1886 and other acquired lands.

Ironically, but for the 1886 Mdewakantons previously awarded lands and use thereof through the Appropriation Acts, and the subsequent 90-year Interior governance over land use to those people, the now recognized post-1934 IRA non-tribal community governments would not exist. Yet, over 90% of the original 1886 Mdewakanton Congressionally-intended beneficiaries are now excluded by the Communities because Interior refuses to comply with its statutory obligations under the Appropriation Acts.

3. The United States holds lands in trust for the post-1934 IRA non-tribal Communities.

In 1980, Congress passed an act requiring all right, title and interest in the United States in lands "which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the [Appropriations Acts], are hereby declared to hereafter *be held by the United States . . . in trust* for the [Communities]."[28]

After enactment of the 1980 Act, Interior stopped making land assignments to 1886 Mdewakanton. Simultaneously, the Communities excluded from

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[28] Pub. L. 9-557, 94 Stat. 3262 (1980) (emphasis added), App. 157.

membership and from the benefits derived from the 1886 lands,[29] all 1886 Mdewakanton who were not already community members. Thus, although the United States appropriated the 1886 lands for 1886 Mdewakanton for their use and benefit (now numbering over 10,700 people) the United States holds the lands in trust for three communities of about 5% of the intended beneficiaries who now exclusively receive all benefits from the 1886 lands. Adding insult to injury, the 1886 land benefits also go to non-1886 Mdewakanton whom Interior permits to be Community members.

Even Interior has asserted the illegitimacy of non-1886 Mdewakanton being members of the community governments and voting.[30] Despite Interior's stated knowledge of non-1886 Mdewakanton being impermissibly on 1886 Lands, Interior has done nothing in the last 12 years to remove the non-1886 Mdewakanton from the 1886 Lands.

The *Wolfchild* litigation is a result of Interior's intentional policies and actions.

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[29] As reported in 1976, Interior holds moneys derived from 1886 lands in an Interior trust account for eventual distribution to the 1886 Mdewakanton. The Federal Circuit remanded the case for further proceedings on that claim. App. 74-75.

[30] *See Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt*, 107 F.3d 667, 669-70 (8th Cir. 1997).

B. The U.S. Court of Federal Claims Proceedings

In *Wolfchild I*, the trial court finds Congressional Appropriation Acts created a trust and that the United States breached that trust.

In November 2003, the petitioners, the 1886 Mdewakanton lineal descendants, filed an action under the Tucker Act and Indian Tucker Act in the U.S. Court of Federal Claims. The petitioners alleged, in part, that the Appropriations Acts created a trust and that the government breached its fiduciary duties to them. The government moved to dismiss the complaint for lack of jurisdiction, asserting that the Appropriations Acts did not create money-mandating fiduciary duties, and even if they did, the post-1934 IRA non-tribal community governments had sovereign power to determine membership and benefits notwithstanding the Appropriation Acts and IRA. The Petitioners filed a cross-motion for partial summary judgment.

In 2004, the U.S. Court of Federal Claims denied the United States' motion to dismiss and granted the Petitioners' motion for partial summary judgment that the Appropriations Acts created a trust for the benefit of the 1886 Mdewakanton and that the United States breached that trust.[31] Relying upon *White*

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[31] *Wolfchild I*, 62 Fed. Cl. at 526-35, App. 166-93.

Mountain Apache,[32] the court concluded that the "agreement between the loyal Mdewakanton and the government includes all the features of a trust."[33] The Court further found an Interior "uniformly consistent practice"[34] over 90 years reinforced the view that Mdewakanton residents in Minnesota or in the actual process of moving to Minnesota on May 20, 1886, and their descendants, are trust beneficiaries to lands acquired under the Appropriation Acts.[35]

The lower court also found the passage of a 1980 Act in which the government held lands in trust for the Communities merely gave greater control over the use of the lands and eliminated two classes of members established by the Communities' constitutions. The Court concluded the 1980 Act did not terminate the created trust: "[t]he 1980 Act does not state as its purpose that the trust for the Mdewakanton would be terminated."[36]

The government subsequently moved for reconsideration – later denied. The court in *Wolfchild II* affirmed its previous decision[37] noting "the government would [rather] introduce an element of confusion and

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[32] *White Mountain Apache,* 537 U.S. 465, 476 n. 3 (2003).

[33] *Wolfchild I,* 62 Fed. Cl. at 540-41, App. 206-07.

[34] *Id.* at 542, App. 214.

[35] *Id.*

[36] *Id.* at 543, App. 215-16.

[37] *Wolfchild II* at 794.

obfuscation where there was none in the contemporaneous actions of the Department [of the Interior]."[38]

Nevertheless, in 2007, the U.S. Court of Federal Claims granted the United States' motion for certification for interlocutory appeal on two issues:

> (1) Whether a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriations Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus; and
>
> (2) If the Appropriations Acts created such a trust, whether Congress terminated that trust with enactment of the 1980 Act.[39]

C. Proceedings on Appeal

The Federal Circuit reverses the lower court.

The Federal Circuit, permitting the interlocutory appeal under 28 U.S.C. § 1292, reversed the lower court's decision and remanded for further proceedings. Without reference to U.S. Supreme Court Indian trust law doctrine, the Federal Circuit did not find

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[38] *Id.* at 787.

[39] *Wolfchild v. United States*, 78 Fed. Cl. 472, 480 (2007), App. 96.

the Appropriation Acts creating a "trust" per se, but "merely appropriating funds subject to a 'statutory use restriction.'"[40] The Circuit concluded that "even if we construed the Appropriation Acts as creating a trust relationship by implication or by operation of law, we would hold that the 1980 Act terminated that trust."[41]

The Federal Circuit described the 1980 Act as one that "simply provides for the long term disposition of the property purchased pursuant to the Appropriation Acts, an issue left unresolved by Congress both in those Acts and during the ensuing 90 years."[42] But, the Circuit dismissed the United States Supreme Court's limitation of the federal government's trust authority under the IRA's § 465 in *Carcieri* "to those members of tribes that were under federal jurisdiction at the time the IRA was enacted"[43] – disregarding the Petitioners' argument to *Carcieri*'s relevancy to the issues then before the Federal Circuit.[44]

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[40] *Wolfchild*, 559 F.3d at 1240, App. 27.

[41] *Id.* at 1257, App. 68.

[42] *Id.* at 1258 n. 13, App. 70.

[43] *Carcieri*, 129 S.Ct. at 1065.

[44] *Wolfchild*, 559 F.3d at 1251 n. 8, App. 53.

REASONS FOR GRANTING THE PETITION

I. The Federal Circuit's "Statutory Use Restriction" Derived from Appropriation Acts Creates a Substantive Enforceable Right, But Without a Legal Forum for Adjudication, Contrary to *Carcieri* and Ninth Circuit Decisions That Provide For Subject Matter Jurisdiction.

In the Federal Circuit's analysis of the first certified question before it – whether the 1888, 1889, and 1890 Appropriation Acts created a trust – the court added to the Supreme Court lexicon of trust law, a new sub-category – "statutory use restriction." Simultaneously, the Circuit held that the Appropriation Acts did not create a trust because the words "trust"[45] or "reservation" were not in the statutory text[46] – thereby avoiding *Mitchell I* and its progeny:

> "[w]hile the legal issue [regarding whether Congress created a trust] is complex and untangling the historical materials is difficult, we conclude that the [1888, 1889, and 1890] Appropriation Acts are best interpreted as merely appropriating funds subject to a statutory use restriction. . . ."[47]

The Circuit's decision means that Interior has apparent fiduciary obligations to the 1886 Mdewakanton

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[45] *Id.* at 1238, App. 20-21.

[46] *Id.* at 1253, App. 58-59.

[47] *Id.* at 1240, App. 27.

as to the statutory use restriction on the 1886 Lands, and thus any deprivation of benefits related to those lands vis-à-vis the Communities. But, the court refused to provide the petitioners with a legal forum for its legal arguments due to an apparent lack of subject matter jurisdiction. The Circuit's decision suggests that a Congressional 1980 Act[48] extinguished all of Petitioners' rights because the United States now holds the 1886 lands in trust exclusively for the post-1934 IRA non-tribal community governments.

Similarly, an Eighth Circuit decision in *Smith v. Babbitt*[49] found 1886 Mdewakanton descendants jurisdictionally barred from pursuing statutory remedies in federal court against the United States:

> Careful examination of the complaints and the record reveals that this action is an attempt by the plaintiffs to appeal the Tribe's membership determinations. It is true that appellants allege violations of IGRA, ICRA, IRA, RICO, and the Tribe's Constitution. However, upon closer examination, we find that these allegations are merely attempts to move this dispute, over which this court would not otherwise have jurisdiction, into federal court.[50]

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[48] App. 157.

[49] 100 F.3d 556 (8th Cir. 1996).

[50] *Smith*, 100 F.3d at 559.

Because the Eighth Circuit decision conflated community political membership issues with claims of breached federal statutory obligations, the affected 1886 Mdewakanton were jurisdictionally barred from pursuing claims against Interior in the U.S. District Court to enforce statutory rights of beneficial interests derived from 1886 lands held in trust by the United States.

Meanwhile, the Federal Circuit's "statutory use restriction" means Interior has apparent fiduciary obligations to ensure benefits, which heretofore have gone to the Communities, now must go exclusively to 1886 Mdewakanton descendants. The Circuit, for instance, found Interior "recognized, of course, that Congress intended the 1886 Mdewakanton to be the specific beneficiaries of the Appropriation Acts . . . [and] . . . adopted a policy designed to promote Congress's intent by assigning lands to individuals from within the group of 1886 Mdewakantons and subsequently to individuals from within the class of the descendants of those Mdewakanton."[51]

The Federal Circuit further acknowledged Interior's role in fulfilling its obligation to the 1886 Mdewakanton: "[c]ontemporaneous documents make clear that the Secretary of the Interior considered himself bound by the terms of the statutes to reserve the usage of the 1886 lands . . . [and] held the property for the use and benefit of individuals

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[51] *Wolfchild*, 559 F.3d at 1243, App. 33.

selected from a defined class."[52] But the Circuit, without analysis to Supreme Court precedent of trust principles in *Mitchell* and its progeny,[53] later explained that: "[c]onsistent with the principle that there is a 'general trust relationship between the United States and the Indian people' . . . Interior Department officials often characterized the 1886 lands as being held in trust for the 1886 Mdewakantons and their descendants, even though they were not a tribe of Indians, but rather were viewed as a group of individuals who had severed their tribal relations and were in need of assistance."[54]

The Federal Circuit recognized cognizable and enforceable fiduciary obligations under the Appropriation Acts to allow the pursuit of remedies in the federal courts against the United States for violating those duties. But, like the Eighth Circuit, the Circuit found that if Interior's obligations to a definitive class of Indians affect present-day post-1934 IRA non-tribal community governments, the federal courts have no subject matter jurisdiction to adjudicate the affected beneficiary class's claims.

In other words, since the benefits derived from the 1886 lands presently go to only members of the post-1934 IRA non-tribal community governments, to the exclusion of all others who Congress intended, the

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[52] *Id.* at 1243, App. 33.

[53] *Mitchell II*, 463 U.S. at 225.

[54] *Wolfchild*, 559 F.3d at 1248, App. 45.

excluded Indians have no judicable remedy because of the lack of federal subject matter jurisdiction.

On the other hand, the Ninth Circuit recognizes that when federal obligations are to be enforced, there exists federal subject matter jurisdiction. In *United States v. Yakima Tribal Court*[55] and *United States v. White Mountain Apache*,[56] the Ninth Circuit held that United States sovereignty – including federal court subject matter jurisdiction – overrides tribal sovereignty in matters involving federal statutory obligations. Therefore, if the Appropriation Acts create a federal obligation, the Petitioners are entitled to subject matter jurisdiction to adjudicate their claims against the United States even though the claims may implicate benefits from lands held in trust by the government for post-1934 IRA non-tribal community governments.

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[55] 806 F.2d 853 (9th Cir. 1986)

[56] 784 F.2d 917 (9th Cir. 1986).

II. The United States Initially Enforced Its Obligations to Individual 1886 Mdewakanton, But Later Abandoned Those Obligations in Lieu of Post-1934 IRA Communities and Excluded 1886 Mdewakanton From Benefits Derived From the 1886 Lands.

The IRA[57] was intended to standardize a process for historical land-owning tribes to formally organize federally-recognized governments. But, the 1886 Mdewakanton were not a "historical tribe" because of the 1863 Act's renouncement of the Mdewakanton as a tribe and the Appropriation Acts' requirement for severance of tribal relations. Thus, the 1886 Mdewakanton "were not privileged to organize as a tribe over various reservations. . . ."[58] However, under IRA, §§ 16 and 19, an additional process existed for a non-tribal group of Indians such as the 1886 Mdewakanton descendants to organize a government based on "residence on reservation land."[59]

Thus, the only basis of the 1886 Mdewakanton forming a political organization lay with the 1886 Mdewakanton "residing on reservation land" – which, in turn, rested on the 1886 Mdewakanton's legal rights to the 1886 lands. Hence, the names of the

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[57] Pub. L. 73-383, 48 Stat. 984 (1934) ("1934 IRA").

[58] JA4656; JA4659-60.

[59] 25 U.S.C. § 476 (prior to amendments in Pub. L. 100-581, Stat. 2938-39 (1988) which contained relevant savings clause at § 103).

organizations are "communities" – reflecting they are something less than historical land-owning tribes.[60]

Accordingly, in 1936, Interior recognized the Lower Sioux Indian Community and the Prairie Island Indian Community. These communities, however, did not have traditional tribal powers of assigning reservation land, condemning member's land or regulating the inheritance of land.[61] Further, the Lower Sioux and Prairie Island constitutions incorporated Interior's 1886 land assignment system to ensure the 1886 lands exclusively benefited the 1886 Mdewakanton:[62]

> The land within the territory of the Lower Sioux Community which was purchased by the United States for the Mdewakanton Sioux residing in the State of Minnesota on May 20, 1886, and their descendants, may be assigned to any Minnesota Mdewakanton Sioux entitled thereto. . . .[63]

Interior, not Lower Sioux or Prairie Island, determined who would benefit from the 1886 lands and reside in the respective communities.

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[60] *See* Felix Cohen, *Basic Memorandum on the Drafting of Tribal Constitutions* 5 (David E. Wilkins, ed., Univ. of Okla. Press 2006).

[61] JA4660; JA1952; JA1990.

[62] JA1952; JA1990; JA4660.

[63] App. 129.

In 1969, 35 years after the enactment of the 1934 IRA, Interior again played *the* major role in the Shakopee Mdewakanton Sioux Community's constitution's adoption. Interior approved the Shakopee Constitution despite the absence of 1934 IRA prescriptions to preserve existing United States' obligations and trusts to a recognized band of Indians – the 1886 Mdewakanton. Among 1886 Mdewakanton who chartered the Shakopee Community and Constitution and became members were non-1886 Mdewakanton.

The Shakopee Constitution was diametrically opposite to the Prairie Island and Lower Sioux Communities' constitutions regarding membership, and, significantly, regarding the preservation of 1886 lands for the 1886 Mdewakanton. For years afterward, Interior reviewed land assignments at Shakopee and insisted on proof of lineal descendency of 1886 Mdewakanton; but, from the start, land assignments were controversial and difficult for Interior's Bureau of Indian Affairs regional office to manage:

> Land assignments on 1886 Mdewakanton lands will be issued only to persons who can prove descendency from the 1886 Mdewakanton residents . . . However, no action will be taken at this time to cancel or disturb any existing assignments as a result of this policy statement.[64]

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[64] JA04719.

By the time of the 1980 Act's passage, in which the United States would then hold 1886 lands in trust for the three communities, Interior was well aware of the need to verify the 1886 descendancy for land assignments. Interior instead supported a policy that left the land assignments to the three post-1934 non-tribal community governments whose membership had been corrupted by the actions of Interior. Interior allowed land and the benefits derived from the 1886 Lands to be shared among those without 1886 Mdewakanton descendancy.

The United States knew of and approved the indiscretion of Shakopee to allow non-1886 Mdewakanton to enjoy benefits of and derived from the 1886 lands to the exclusion of others. Interior's complicity is affirmed in 1983: "[T]he [1983] Enrollment Ordinance contains the name of 33 individuals . . . These individuals are to be considered members of the Shakopee Mdewakanton Sioux Community regardless of their blood degree."[65]

Thus, Interior allowed and affirmed its approval of the inclusion of *non-lineal* Mdewakanton among lineal descendants of 1886 Mdewakanton.[66]

With Interior's complicity and approval, Communities' policies led to the complete exclusion of 1886 Mdewakanton denying them any benefits to or from

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[65] JA04747.

[66] *See also, Babbitt*, 107 F.3d at 669-70.

1886 lands. By 1988, Shakopee closed its membership to the current members including the non-1886 Mdewakanton. Prairie Island and Lower Sioux followed Shakopee's example.

In conjunction with Interior's complicity, the Shakopee Community Court, created in about 1988, while admitting to genealogical controversies, it refused to assert jurisdiction to exclude the non-1886 Mdewakanton or to include the 1886 Mdewakanton:

> Suffice it to say that the files of the federal courts and federal agencies . . . are littered with records of disputes which had, at their base, understandable desires on the part of some to participate in the Community's resources, justifiable fears that such participation would be denied by others, and profound doubts that there was any forum which had jurisdiction to respond.[67]

Thus, even the Shakopee Community Court is in accord with the Federal Circuit and Eighth Circuit decisions denying Petitioners' jurisdiction to enforce federal obligations over 1886 lands. But, under *Carcieri* and the Ninth Circuit decisions, federal court subject matter jurisdiction exists over claims of statutory violations by Interior – presumably even those involving a post-1934 Act non-tribal community government.

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[67] *Ross v. SMS(D)C*, 1 Shak. 86, 87 (July 17, 1992), App. 144.

This Court should consider, after *Carcieri*, that federal courts have subject matter jurisdiction to hear Indian statutory violation claims against the United States. The Eighth Circuit decision in *Smith v. Babbitt* – and now the Federal Circuit decision – have raised substantial doubts if federal court subject matter jurisdiction exists.

III. The Federal Circuit's Statutory Interpretation of the Appropriation Acts Contradicts Supreme Court Precedent in *Mitchell I, Mitchell II, White Mountain Apache, Navajo I, Navajo II* and *Carcieri*.

The Federal Circuit reversed the trial court on the first certified question regarding the Appropriation Acts imposing a statutory duty on the Secretary of Interior regarding Mdewakanton beneficiaries:

> [. . .] And all of said money which is to be expended for lands [by the Interior Secretary] . . . shall be so expended that each of the Indians in this paragraph shall receive, as nearly as practicable, an equal amount in the value of the appropriation.[68]

Lands were purchased under the Appropriation Acts that are currently held in trust by the United States. The Federal Circuit denied the Appropriation Acts created a "trust" and in its stead adopted a "statutory use restriction" as a substitute to statutory

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[68] App. 154-55.

interpretative analysis regarding the application of Indian trust law – all in direct conflict with Supreme Court precedent regarding statutory interpretation.

The Federal Circuit provided a one-sentence, forty-two word textual analysis to shift the legal framework in determining the legal responsibilities and liabilities between the federal government and Native Americans:

> That clause, which the record materials suggest was added because of complaints that the funds from an earlier appropriation were disproportionately distributed, provides such minimal direction that it is plainly insufficient to convert what would otherwise be an appropriation into a trust.[69]

The Federal Circuit's one-sentence analysis violated Supreme Court statutory interpretative principles governing Native American trust cases:

- The "Substantive Source of Law" doctrine ("*Navajo I*")[70] and ("*Navajo II*");
- the "Plain Meaning Rule" (*Carcieri*);
- "The Word 'Trust' In the Law Is Not Necessary to Create an Indian Trust" doctrine ("*Mitchell I*") and ("*Mitchell II*"); and

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[69] *Wolfchild*, 559 F.3d at 1239, App. 24.

[70] *United States v. Navajo Nation*, 537 U.S. 488 (2003).

- The Fair Inference Rule of *Mitchell II* (also applied in *United States v. White Mountain Apache.*)[71]

First, the Federal Circuit's decision contradicts with the principles of statutory construction expressed in *Navajo II:*

> In *Navajo I*, we reiterated that the analysis must begin with "specific rights-creating or duty-imposing statutory or regulatory prescriptions." 537 U.S., at 506, 123 S.Ct. 1079. If a plaintiff identifies such a prescription, and if that prescription bears the hallmarks of a "conventional fiduciary relationship," *White Mountain,* 537 U.S., at 473, 123 S.Ct. 1126, then trust principles (including any such principles premised on "control") could play a role in "inferring that the trust obligation [is] enforceable by damages," *id.*, at 477, 123 S.Ct. 1126. But that must be the second step of the analysis, not the starting point.[72]

The Federal Circuit found a "statutory use restriction" suggesting either a substantive right or duty-imposing prescription, but stopped its analysis there. The court avoided further trust analysis as it relates to a conventional fiduciary relationship although the

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[71] *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *See also, Duncan v. United States*, 667 F.2d 36 (Ct. Cl. 1981).

[72] *Navajo Nation II*, 129 S.Ct. at 1558.

Appropriation Acts contain specific Congressional directives: "each of the Indians in this paragraph shall receive, as nearly as practicable, an equal amount in the value of the appropriation."[73] The Federal Circuit violated the statutory interpretative approach dictated by *Navajo II*.

Second, put another way, the Federal Circuit's one-sentence analysis ignored the Plain Meaning Rule most recently applied in *Carcieri*:

> This case requires us to apply settled principles of statutory construction under which we must first determine whether the statutory text is plain and unambiguous. *United States v. Gonzales*, 520 U.S. 1, 4, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997). If it is, we must apply the statute according to its terms.[74]

The Circuit avoided interpreting the Appropriation Acts' plain language that the Secretary of the Interior was to ensure each Indian beneficiary "shall receive, as nearly as practicable, an equal amount in value of this appropriation." Without analyzing the text, the Federal Circuit concluded the statute provided "minimal direction" and there was no trust duty on the Secretary of the Interior to the Petitioners regarding the "lands" purchased.

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[73] App. 154-55.

[74] *Navajo Nation II*, 129 S.Ct. at 1558 (citations omitted).

Third, the Federal Circuit's decision contradicts *Mitchell II* and *White Mountain Apache*. The Supreme Court in *Mitchell II* held that the word "trust" is not necessary in a law to create statutory trust obligations on the United States.[75]

The Federal Circuit, to the contrary, required more than what *Mitchell II* demands. The Court required the word "reservation" or "trust" expressed within the Acts.

As the *Mitchell II* Court stated, "[a]ll of the necessary elements of a common-law trust are present: a trustee (the government), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)." *Id.* at 225. But, the Federal Circuit failed to recognize that all the necessary elements of a common law trust are present in the *Wolfchild* case: a trustee (Secretary of the Interior), beneficiaries (petitioners) and a trust corpus (1886 lands).

The Federal Circuit's decision also contradicts *White Mountain Apache*. In *White Mountain Apache*, the Court held under the fair inference rule that a 1960 Congressional Act at issue created fiduciary duties on Interior:

> The 1960 Act goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and liable in

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[75] *Mitchell II*, 463 U.S. at 225-26; *see also*, *Carcieri*, at 129 S.Ct. at 1063-64.

> damages for breach. . . . [T]he fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee. . . . "One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets."[76]

The Federal Circuit did not apply the fair inference rule.

In summary, because the Appropriation Acts place an express statutory duty on the Secretary of the Interior to ensure that 1886 Mdewakanton beneficiaries "shall receive, as nearly as practicable, an equal amount in value of this appropriation" – there is more evidence of statutory intent of a trust obligation than the minimal requirements of *Mitchell II* and *White Mountain Apache* require and something more than a "statutory use restriction." Therefore, the Federal Circuit's analysis not only contradicts *Mitchell II* and *White Mountain Apache,* but represents a major shift in interpretation of statutes and in application of trust principles to Native American statutes.

The doctrinal shift is further evidenced by the Federal Circuit's decision not to apply its own presumption that "Congress is knowledgeable about

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[76] *White Mountain Apache Tribe*, 537 U.S. at 474-77 (footnotes and citations omitted).

existing law pertinent to legislation it enacts."[77] This presumption and deference to the common law governing the statutory enactments at the time of passage, requires the application of the then known trust law to ascertain whether Congress intended to create a trust. This presumption is consistent with trust law:

> In construing an inter vivos trust, the provisions of the trust are to be governed by the law existing *at the time of its creation*, not the law and public policy in effect at the time the construed words will take effect, absent a contrary intention within the instrument itself.[78]

This requires an analysis of Congress' presumption of knowledge. In this case, the Federal Circuit did not do the required analysis. The applicable trust law at the time of enactment is essential to statutory interpretative analysis in Indian trust law cases. For example, *A Practical Treatise on the Law of Trust,* vol. 1, 24 (Thomas Lewin, Frederick Lewin and James H. Flint, 1st Am. ed., Charles H. Edson 1888) finds in the creation of a trust that a person,

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[77] *See, e.g., Canadian Lumber Trade Alliance v. United States,* 517 F.3d 1319, 1343 (Fed. Cir. 2008), *quoting Bristol-Myers Squibb Co. v. Royce Lab.*, 69 F.3d 1130, 1136 (Fed. Cir. 1995) (internal quotation omitted).

[78] 76 Am. Jur. 2d Trusts § 36 (2008) (citations omitted) (emphasis added).

> [N]eed only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in limitation of legal estates . . . *provided words be used which thought not technical are yet popularly equivalent*, or the intention otherwise sufficiently appears upon the face of the instrument.[79]

Congress used the popular equivalent of "trust" language when it created an express statutory duty on the Secretary of the Interior that the Indian beneficiaries "shall receive, as nearly as practicable, an equal amount in value of this appropriation." The Federal Circuit's absence of analysis regarding Congressional presumptive knowledge of trust law at the time of enactment reflects a lapse in statutory trust analysis.

The Federal Circuit decision further conflicts with the principles espoused in its predecessor United States Court of Claims in *Duncan v. United States*.[80] The *Duncan* court explained that: "it is difficult to see why Congress should have to do more to create an Indian trust than a private settlor would have to do to establish a private trust."[81] Under *Duncan*, if an

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[79] *Id.* at 147-48 (emphasis added). *See also, id.* at 70, 71 n. 1; *A Treatise on the Law of Trusts and Estates*, vol. 1, 68 (Jarias Ware Perry, 4th ed., Little Brown, 1889).

[80] *Duncan v. United States*, 229 Ct. Cl. 120, 667 F.2d 36 (1981).

[81] 667 F.2d at 42 n. 10.

appropriation act text would create a private trust, then the same text in public law creates a trust, too. Thus, if a private person who accepted an express duty to ensure that certain beneficiaries "shall receive, as nearly as practicable, an equal amount in value of this appropriation" is a trustee, then the Secretary of the Interior is also a trustee by the same language found in the Appropriation Acts. The Federal Circuit's one-sentence analysis contradicts *Duncan's* principle that "Congress should not have to do more than a private settlor to create a trust."

Ultimately, the Federal Circuit's statutory interpretative approach towards Congressional Acts shifts away from 30 years of Supreme Court precedent in Native American trust cases: *Mitchell I, Mitchell II, Navajo Nation I, White Mountain Apache, Navajo Nation II* and *Carcieri*. The Supreme Court should grant review to ultimately determine whether the Federal Circuit's doctrinal shift espoused in *Wolfchild* has eviscerated, modified, or undermined this Court's interpretative analysis of Indian trust law.

IV. The Federal Circuit's Statutory Interpretative Approach on the Second Certified Question Contradicts the Plain Meaning Rule, *Carcieri*, 25 U.S.C. § 462, *Passamaquoddy's* "Plain and Unambiguous" Requirement and Established Congressional Practice Regarding Indian Trust Termination.

The *Wolfchild* Federal Circuit decision is contrary to *Carcieri*, 25 U.S.C. § 462, and ultimately as the decision pertains to trust terminations as found in *Passamaquoddy Tribe*.[82] In the first instance, the Circuit found *Carcieri* not relevant to the questions before it.[83] Simply, the Federal Circuit held that the post-1934 IRA non-tribal community governments are the exclusive beneficiaries of the lands purchased under the 1888, 1889 and 1890 Appropriation Acts. But, the Circuit's holding is contrary to *Carcieri* and therefore *Carcieri* is relevant.

Carcieri relates to the legal identity of the Prairie Island, Lower Sioux, and Shakopee Communities under the 1934 IRA. The legal basis under the 1934 IRA for the federally-recognized community governments was the 1886 Loyal Mdewakanton residing on

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[82] *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (C.A. Me. 1975).

[83] The court did acknowledge Petitioners' notification of *Carcieri*, but dismissed its relevancy in a footnote. *Id.* at 1251, n. 8, App. 53. *Carcieri* was issued two weeks before the Circuit's issued decision.

reservation lands – the 1886 lands. Furthermore, this statutorily-defined class of beneficiaries is a "band" – not a "tribe" – of Loyal Mdewakanton. This "band" was found by Interior to be under federal jurisdiction in 1934.

Thus, if there were any "ownership interests" in the 1886 lands, it was those of the 1886 Mdewakanton and their descendants in 1934, not the political governments created 2 or 35 years later. The Federal Circuit concluded that:

> [A]s of the time of the 1980 Act, those lands were being held by the Department of the Interior for use by the 1886 Mdewakantons and their descendants pending an ultimate legislative determination as to how the ownership interests in the lands should be allocated. That determination came in 1980, when Congress provided that legal title in the lands would be held by the United States, which would hold the lands in trust for the three communities.[84]

The Federal Circuit's conclusion is antithetical to this Court's holding in *Carcieri*. The Circuit's decision, not to apply the *Carcieri* reasoning as it applies to the 1934 IRA, goes directly to whether the instant Petitioners or other Native Americans and Native American tribes will have federal courts to adjudicate their claims. As *Carcieri* explained:

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[84] *Wolfchild*, 559 F.3d at 1255, App. 62.

> [F]or purposes of [IRA] § 479, the phrase "now under Federal jurisdiction" refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, § 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934. Because the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted, the Secretary does not have the authority to take the parcel at issue into trust.[85]

Thus, *Carcieri* suggests that the Minnesota Mdewakanton post-1934 IRA non-tribal community governments established in 1936 (two) and in 1969 (one) are not "Indian tribes" under § 476. Here, the Mdewakanton Communities do not have a legal identity independent, separate and apart from the 1886 Mdewakanton under the IRA. Consequently, there is nothing in the 1980 Act's references to each of the Mdewakanton Communities to suggest Congressional intent to exclude 95% of the 1886 Mdewakanton from the subject matter of the Appropriation Acts – the 1886 lands and benefits derived therefrom – to allow 5% of the 1886 Mdewakanton and non-1886 Mdewakanton to receive 100% of the 1886 lands and its benefits.

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[85] *Carcieri*, 129 S.Ct. at 1061.

Carcieri reinforces this point. The Federal Circuit was required, in light of *Carcieri*, to determine whether the Communities have a legal identity independent, separate and apart from the petitioners, who as original beneficiaries under the Appropriation Acts did in fact have a legal identity under the 1934 IRA. Instead, the Circuit found the 1980 Congressional Act as an alteration of the ownership status of 1886 lands:

> whereby the United States would hold legal title to the lands and each of the communities would hold equitable title to the portions of the 1886 lands allocated to it.[86]

But, *Carcieri* required the Federal Circuit to answer who is the ultimate beneficiary of the "lands" after the 1980 Act. The Federal Circuit refused to do so – finding *Carcieri* not relevant. The Federal Circuit's decision not to apply *Carcieri* and failure to answer this question – leaves a legal quagmire for the trial court to resolve.

Importantly, 25 U.S.C. § 462, part of the 1934 IRA, continued all Indian land beneficiary rights unless terminated by Congressional enactment:

> The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.

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[86] *Wolfchild*, 559 F.3d at 1255, App. 62-63.

Another important question under 25 U.S.C. § 462 in this case is whether Congress is required to "plainly and unambiguously" terminate Indian beneficiary rights. The Federal Circuit did not apply a "plain and unambiguous" legal standard in determining whether the 1980 Act was a trust termination act.

The Federal Circuit's failure to apply the "plain and unambiguous" legal standard contradicts longstanding precedent of the U.S. Court of Appeals regarding statutory trust termination: "[A]ny *withdrawal of trust obligations* by Congress [with Indians] would have to have been 'plain and unambiguous' to be effective."[87] *Passamaquoddy's* legal standard is consistent with 25 U.S.C. § 462 which extends all Native American trust beneficiary rights in perpetuity and requires Congress to provide "directions" to terminate Indian trust beneficiary rights.

Moreover, *Passamaquoddy's* legal standard is consistent with the law of trusts which provides that any termination or modification of a trust must be done by "clear and convincing evidence."[88] The primary concern is that beneficiaries receive adequate notice of enactment of the trust termination act *before* enactment of the trust termination act – presumably so they can lobby against it.

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[87] *Joint Tribal Council of the Passamaquoddy Tribe*, 528 F.2d at 380 (emphasis added).

[88] Restatement (Third) of Trusts § 63(3) (2003).

As the U.S. Court of Federal Claims recognized, absent in the 1980 Act is Congressional use of the "plain and unambiguous" language to terminate the government's trust obligations to the Indian beneficiaries as found in earlier trust termination acts.[89]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[89] *See* 25 U.S.C. § 677 (Ute Tribe); 25 U.S.C. § 564 (Klamath Tribe); 25 U.S.C. § 741 (Paiute Tribe); 25 U.S.C. § 691 (certain tribes and bands of Indians located in western Oregon); 70 Stat. 893 (Wyandotte Tribe); 70 Stat. 937 (Peoria Tribe); 70 Stat. 963 (Ottawa Tribe); 65 Stat. 250 (Menominee Tribe); and 25 U.S.C. § 980 (Ponca Tribe).

559 F.3d 1228

United States Court of Appeals,
Federal Circuit.

Sheldon Peters WOLFCHILD, et al., Ernie Peters Longwalker, et al., Scott Adolphson, et al., Morris J. Pendleton, et al., Barbara Feezor Buttes, et al., Winifred St. Pierre Feezor, et al., Autumn Weaver, et al., Aries Bluestone Weaver, et al., Elijah Bluestone Weaver, et al., Ruby Minkel, et al., Lavonne A. Swenson, et al., Willis Swenson, et al., Aaron Swenson, et al., Beverly M. Scott, et al., Lillian Wilson, et al., Monique Wilson, et al., Sandra Columbus Geshick, et al., Cheryl K. Lorusso, et al., Jennifer K. Lorusso, et al., Cassandra Shevchuk, et al., Jason Shevchuk, et al., James Paul Wilson, et al., Eva Grace Wilson, et al., Benita M. Johnson, et al., and Kevin Lorusso, et al.,
Plaintiffs-Appellees,
and
Harley D. Zephier, Sr., et al.,
Plaintiffs-Appellees,
and
Elizabeth T. Walker, Walker Group, and John Does 1-30,
Plaintiffs-Appellees,
and
Gertrude Godoy, et al., Michael Stephens, et al., Jesse Cermak, et al., Delores Klingberg, et al., Sally Ella Alkire, et al., Pierre George Arnold, Jr., et al., and Denise Henderson, et al.,
Plaintiffs-Appellees,
and
Lower Sioux Indian Community,
Plaintiffs-Appellees,

and
Winona C. Thomas Enyard, et al.,
and Jeffrey Arnold Kitto, et al.,
Plaintiffs-Appellees,
and
Madaline Rocque, et al., Mary Taylor
(Tatewastewin), et al., Margaret (Dumarce)
Prescott, et al., and Joseph Coursolle, et al.,
Plaintiffs-Appellees,
and
Mary Beth Lafferty, et al., Anita D. Whipple, et al.,
Bonnie Rae Lowe, et al., and
Lenor A. Scheffler Blaeser, et al.,
Plaintiffs-Appellees,
and
Julia Dumarce, et al.,
Plaintiffs-Appellees,
and
Francine Garreau Hall, et al.,
Plaintiffs-Appellees,
and
Kristine Abrahamson, et al.,
Plaintiffs-Appellees,
and
Victoria Robertson Vadnais, et al.,
Plaintiffs-Appellees,
and
Marvel Jean Dumarce, et al., and Vivian Cordelia
Youngbear, et al.,
Plaintiffs-Appellees,
and
Danny Lee Mozak, et al.,
Plaintiffs-Appellees,
and

Dawn Burley, Raymond Cournoyer, Sr., Francis Elaine Felix, Rebecca Elizabeth Felix, Lydia Ferris, Leslie Lee French, Dawn Henry, Sandra Kimbell, Jerry Robinette, Vera A. Rooney, Deborah L. Saul, Robert Lee Taylor, Daniel M. Trudell, Laura Vassar, Charlene Wanna, Ke Zephier, and John Does 31-433,
Plaintiffs,

v.

UNITED STATES,
Defendant-Appellant.
No. 2008-5018.

March 10, 2009.
Rehearing En Banc Denied June 11, 2009.

Erick G. Kaardal, Mohrman & Kaardal P.A., of Minneapolis, MN, argued for all plaintiffs-appellees Sheldon Peters Wolfchild, et al.

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Elizabeth T. Walker, Walker Law LLC, of Alexandria, VA, for plaintiffs-appellees Walker Group, et al.

Jack E. Pierce, Pierce Law Firm, P.A., of Minneapolis, MN, for plaintiffs-appellees Gertrude Godoy, et al.

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Scott A. Johnson, Johnson Law Group, of Minnetonka, MN, for plaintiffs-appellees Madaline Rocque, et al.

Wood R. Foster, Jr., Siegel Brill Greupner Duffy & Foster P.A., of Minneapolis, MN, for plaintiffs-appellees Mary Beth Lafferty, et al.

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Randy V. Thompson, Nolan, MacGregor, Thompson & Leighton, of Saint Paul, MN, for plaintiffs-appellees Kristine Abrahamson, et al.

Royce D. Edwards, Jr., of Joplin, MO, for plaintiffs-appellees Victoria Robertson Vadnais, et al., of Britton, SD, for plaintiffs-appellees Marvel Jean DuMarce, et al.

Barry P. Hogan, Renaud Cook Drury Mesaros, PA, of Phoenix, AZ, for plaintiffs-appellees John Doe, 1-433, et al. Of counsel was Elizabeth T. Walker, Walker Law LLC, of Alexandria, VA.

Garrett J. Horn, Horn Law Office, of Yankton, SD, for plaintiffs-appellees Lydia Ferris, et al.

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Aaron P. Avila, Trial Attorney, Appellate Section, Environment and Natural Resources Division, United States Department of Justice, of Washington, DC, for defendant-appellant. With him on the brief were Ron L. Tenpas, Assistant Attorney General and Laura Maroldy, Attorney.

Before RADER, BRYSON, and PROST, Circuit Judges.

BRYSON, Circuit Judge.

This case comes to us on interlocutory appeal from the Court of Federal Claims. The plaintiffs in the underlying action claimed that the government breached its fiduciary obligations with respect to certain real property that the government was required to hold in trust for them. The order on appeal sets forth two questions of law as to which the trial court concluded that there is a substantial ground for difference of opinion and that an immediate appeal could materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(d)(2). We address

those two questions of law in this opinion and reverse the trial court's ruling as to each question.

I

The trial court's opinions contain a thorough canvass of the complex factual and legal background of this case. *See Wolfchild v. United States,* 62 Fed.Cl. 521, 526-35 (2004) (*Wolfchild I*); *Wolfchild v. United States,* 68 Fed.Cl. 779, 782-83, 785-94 (2005) (*Wolfchild II*). We borrow heavily from the trial court's analysis of the facts and the governing legal principles, even though at the end of the day we disagree with the trial court's legal conclusions as to the two questions certified for appeal.

A

In 1862, the Minnesota Sioux, who were then living on a reservation in southern Minnesota, rebelled against the United States. After the uprising was quelled, Congress annulled the treaties that had established the reservation and that had provided for an annuity to be paid to the tribe. *See* Act of Feb. 16, 1863, ch. 37, 12 Stat. 652; Act of Mar. 3, 1863, ch. 119, 12 Stat. 819. The effect of that action was to confiscate all of the tribe's reservation lands in Minnesota and force the Sioux to relocate farther west.

During the uprising, some of the Sioux remained loyal to the United States. Many of those individuals severed their ties to the tribe and remained in

Minnesota. However, the government's confiscation of the Sioux lands and the termination of the annuities that were paid pursuant to the annulled treaties left those individuals poverty-stricken and homeless. In recognition of their situation, Congress took steps to assist those individuals. The group, which consisted of approximately 200 individuals, were known as the "loyal Mdewakantons," a reference to the Mdewakanton band of the Sioux tribe with which they had been affiliated.

In the 1863 statute that annulled the Sioux treaties, Congress authorized the Secretary of the Interior to set aside parcels of 80 acres of public land for any individual among the Minnesota Sioux "who exerted himself in rescuing the whites" during the 1862 revolt. Act of Feb. 16, 1863, § 9, 12 Stat. at 654. Congress further provided that the allotted land "shall not be subject to any tax, forfeiture, or sale, by process of law, and shall not be aliened or devised, except by the consent of the President of the United States, but shall be an inheritance to said Indians and their heirs forever." *Id.* Two weeks after the enactment of that provision, however, Congress superseded it with another statute dealing with the same authorization. Unlike in the earlier statute, Congress did not attempt to define the property interest that the Indians would receive in lands that were to be set aside for them. Instead, the later statute provided that any lands that were assigned would be "held in such tenure as is or may be provided by law." Act of Mar. 3, 1863, § 4, 12 Stat. at

819. Thus, in that statute (as was to be the case on several subsequent occasions), the issue of the ownership rights in the land that was to be set aside for the use of the loyal Mdewakantons was not resolved, but was left for later determination.

The Secretary never exercised the authority granted by the 1863 legislation, and no lands were provided to the loyal Mdewakantons at that time, apparently because of opposition by white settlers to allowing even the loyal Sioux to settle in the state. *See* H.R. Exec. Doc. No. 39-126, at 10 (1865) ("Congress . . . provided lands [for the loyal Mdewakantons] near their old homes, but [they] are not allowed by the whites to live upon and cultivate them"); H.R. Exec. Doc. No. 50-61, at 2 (1889) (the Secretary withdrew property from the public lands for the loyal Mdewakantons, "but such was the blind fury of the whites after the outbreak of 1862 and 1863 that these Indians were also removed").

Two years later, however, Congress recognized that those individuals, who "at the risk of their lives aid[ed] in saving many white men, women, and children from being massacred," had as a result been forced to sever their relationships with the tribe and "were compelled to abandon their homes and property, and are now entirely destitute of means of support." Act of Feb. 9, 1865, ch. 29, 13 Stat. 427; *see* H.R. Exec. Doc. No. 39-126, at 3. Congress at that time appropriated $7,500 to provide for the loyal Mdewakantons, but it took no further action to assist them until the 1880s. In the intervening years, many

of the loyal Mdewakantons, who were impoverished and faced continuing hostility from white settlers, left Minnesota. *See* Roy W. Meyer, *History of the Santee Sioux* 258-72 (1967).

On several occasions beginning in 1884, Congress appropriated funds to be used for the benefit of the Mdewakantons who had remained in Minnesota or had returned to the state. In 1884, Congress appropriated $10,000 to purchase stock "and other articles necessary for their civilization and education, and to enable them to become self-supporting." Act of July 4, 1884, ch. 180, 23 Stat. 76, 87. The following year, Congress amended that Act to allow the Secretary of the Interior to disburse funds to the Mdewakantons "for agricultural implements, lands, or cash, as in his judgment may seem best for said Indians." Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, 375. And in the next year, Congress appropriated another $10,000 for the purchase of "such agricultural implements, cattle, lands, and in making improvements thereon, as in [the Secretary's] judgment may seem best for said Indians." Act of May 15, 1886, ch. 333, 24 Stat. 29, 39-40.

Under the authority of those statutes, Interior Department officials purchased land and distributed it to several of the loyal Mdewakantons, giving them fee simple ownership of the properties. *Sixtieth Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior* 111 (1891). That effort failed to provide long-term relief for the Mdewakantons, however, because as Interior Department officials

later acknowledged, most of the recipients of the land grants sold, abandoned, or encumbered the properties. After that time, the Interior Department discontinued the practice of transferring land to the loyal Mdewakantons in fee.

In 1888, 1889, and 1890, Congress enacted the three pieces of legislation that are the central focus of this case. In each of those statutes, which are referred to in this litigation as "the Appropriations Acts," Congress appropriated funds for the support of a number of designated Indian tribes. Each Act contained, among the many designated appropriations for the support of particular groups of Indians, a paragraph allocating a small sum to be used for the benefit of the Mdewakantons who had remained in Minnesota after the 1862 revolt or had returned to Minnesota in the following years. *See* Act of June 29, 1888, ch. 503, 25 Stat. 217, 228-29 ($20,000); Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992-93 ($12,000); Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349 ($8,000). The Secretary of the Interior was authorized to spend those appropriated funds as he saw fit for the benefit of the qualifying Mdewakantons. The statutes authorized the purchase of agricultural implements, cattle, horses, food, clothing, buildings, seed, or land, at the discretion of the Secretary.

Although each of the Appropriations Acts used slightly different language, the operative provisions were largely similar. The 1890 Act, for example, provided as follows, in pertinent part:

> For the support of the full and mixed blood Indians in Minnesota heretofore belonging to the Medewakanton band of Sioux Indians, who . . . have severed their tribal relations, eight thousand dollars, to be expended by the Secretary of the Interior as in his judgment he may think best, for such lands, agricultural implements, buildings, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these Indians or families thereof. . . .

26 Stat. at 349. The 1889 and 1890 Acts also provided that the appropriated funds should be "so expended that each of the Indians in this paragraph mentioned shall receive, as nearly as practicable, an equal amount in value of this appropriation." 25 Stat. at 992-93; 26 Stat. at 349. Although the 1888 Act contained no such proviso, the 1889 Act stipulated that the "equal amount" requirement should apply to the funds appropriated under the 1888 Act. 26 Stat. at 993. Two other differences among the three statutes are (1) the 1888 and 1889 Acts made provision for "full blood" Mdewakantons, while the 1890 Act made provision for "full and mixed blood" Mdewakantons, and (2) the 1889 and 1890 Acts gave the Secretary discretion to make spending decisions based on what he deemed best in the case of "each of these Indians or families thereof," while the 1888 Act made no reference to the beneficiaries' families.

The Interior Department used approximately $15,600 of the $40,000 appropriated under the three Appropriations Acts to purchase parcels of land in

various parts of southern Minnesota where the Mdewakantons had settled. Because of difficulties in determining which of the Mdewakantons qualified as "loyal" during the 1862 uprising, the Appropriations Acts provided that the appropriations would be designated for the benefit of all Mdewakantons who were living in Minnesota as of May 20, 1886. As a result, the lands purchased with funds from the three Appropriations Acts are known as "the 1886 lands," and the Mdewakantons who were statutorily eligible for benefits under the Acts are commonly referred to as "the 1886 Mdewakantons."[1] Title to those lands was taken in the name of the United States, and the deeds contained no trust designation or other limitation on title.

As of 1980, notwithstanding several intervening exchanges and sales, the 1886 lands remained largely intact. The lands consisted of a number of small plots, totaling approximately 950 acres. The tracts were located in three Minnesota counties: Scott County ("the Shakopee lands"); Redwood County ("the Lower Sioux lands"); and Goodhue County ("the Prairie

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[1] In several years after the Appropriations Acts, Congress appropriated funds for the "support and civilization" of the Mdewakantons in Minnesota. *See, e.g.*, Act of Mar. 2, 1895, ch. 188, 28 Stat. 873, 892; Act of June 10, 1896, ch. 398, 29 Stat. 321, 338; Act of June 7, 1897, ch. 3, 30 Stat. 62, 78; Act of July 1, 1898, ch. 545, 30 Stat. 571, 586; Act of Mar. 1, 1899, ch. 324, 30 Stat. 924, 938. Those later statutes, however, did not specifically authorize purchases of land, and the parties have not put those statutes at issue in this case.

Island lands"). The Department of the Interior assigned individual plots from those lands to qualifying Mdewakantons for their use and occupancy as long as they resided on or otherwise used the land. After a particular assignee died or abandoned the property, the Department would re-assign the land to another qualifying Mdewakanton. The new assignment was often made to a descendant of the previous assignee. The Interior Department, however, did not regard the interest of the assignees in the property as rights that passed through inheritance.

Pursuant to the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, three Mdewakanton communities were formed in the three areas where the 1886 lands were located. The three communities are the Prairie Island Indian Community, the Shakopee Mdewakanton Sioux Community, and the Lower Sioux Indian Community. The enrolled membership of the three communities consists largely of lineal descendants of the Mdewakantons who were living in Minnesota in 1886, but some enrolled members are not descendants of the 1886 Mdewakantons, and many of the descendants of the 1886 Mdewakantons are not enrolled members of any of the three communities.[2] Over time, the government purchased an

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[2] As of 1979, more than 95 percent of the enrolled members of the three communities were lineal descendants of the 1886 Mdewakantons. At that time, the Lower Sioux Indian Community had 152 members (139 of whom were lineal descendants of the 1886 Mdewakantons), the Prairie Island Indian Community had 109 members (106 of whom were lineal descendants

(Continued on following page)

additional 414 acres for the Prairie Island community and an additional 872.5 acres for the Lower Sioux community. Those lands were regarded as reservation lands and as such were held in trust for those two communities. Prior to 1980, those reservation lands were treated as having a legally distinct status from the 1886 lands, even though parcels of the two classes of property were intermingled in the same areas within the geographical boundaries of the Prairie Island and Lower Sioux communities.

In 1980, Congress enacted legislation designed to give the three communities political control over all the property within the communities that had been set aside for Indians, including the 1886 lands. In particular, the legislation sought to overcome the administrative problems that resulted from the communities having two different classes of members and two different classes of property interspersed in a "checkerboard pattern" within their geographical boundaries. *See* S.Rep. No. 96-1047, at 2 (1980). In order to solve that problem, the 1980 statute provided that the 1886 lands, which "were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians" under the Appropriations Acts, would henceforth be "held by the United States . . . in trust for" the three communities. Pub.L. No. 96-557, 94 Stat. 3262 (1980). The 1980 Act

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of the 1886 Mdewakantons), and the Shakopee Mdewakanton Sioux Community had 96 members (94 of whom were lineal descendants of the 1886 Mdewakantons).

contained a savings clause stating that the Act would not alter any rights under any contract, lease, or assignment entered into or issued prior to the Act. Thus, all of the individuals then holding assignments to the 1886 lands retained their rights to use the land unaffected by the 1980 legislation. The Interior Department, however, made no new assignments thereafter.

B

For more than a century after the purchase of the 1886 lands, those properties were used mainly for residential and agricultural purposes and were not particularly valuable.[3] However, following the introduction of casino gambling on Indian land in the mid-1990s, the situation changed dramatically. According to the complaint in this case, "profitable casinos, hotels, and other profit-making businesses have been established and developed" on the 1886 lands. As a result, the proceeds from certain of those lands and the nearby reservation lands have become extremely valuable.

Because of the position taken by the Department of the Interior that the disputed properties are held in trust for the three Mdewakanton communities, the descendants of the 1886 Mdewakantons who are not

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[3] At the time of the 1980 Act, the Interior Department estimated that the 950 acres constituting the 1886 lands were worth a total of approximately $1,500,000.

members of those communities have not received any of the proceeds from the gambling casinos and related entertainment facilities. Instead, those proceeds have gone to the enrolled members of the three communities.

In 2003, a group of individuals who claimed to be lineal descendants of the 1886 Mdewakantons filed suit in the Court of Federal Claims seeking damages from the United States based in part on an asserted breach of fiduciary duty. Over time, more individuals have joined the suit as plaintiffs, and the plaintiffs now number more than 20,000.

The plaintiffs' theory of the case was that the Appropriations Acts created a trust for the 1886 Mdewakantons and their descendants that gives the plaintiffs rights to the proceeds of the trust corpus because of their status as owners of equitable title to those lands. *Wolfchild I,* 62 Fed.Cl. at 540. They contended that the 1980 statute did not terminate that trust and that it was improper for the government, following the enactment of the 1980 statute, to treat the 1886 lands as being held in trust for the benefit of the three communities. Instead, they asserted, the proceeds of the 1886 lands should have gone to the lineal descendants of the 1886 Mdewakantons, the intended beneficiaries of the lands that were purchased with the Appropriations Acts funds. According to the complaint, each of the plaintiffs was entitled to a prorated share of "the income, profits and proceeds from all reservation lands at Shakopee, Prairie Island, and Lower Sioux (including but not limited to

per-capita payments from casino profits and other revenues)." The complaint further alleged that the government has breached its fiduciary duties by failing "to ensure that the income, profits and proceeds from all reservation businesses – including per-capita payments from casino profits – are distributed as equally as practicable among all of the trust beneficiaries of the reservation lands."

The government responded that the Appropriations Acts did not create a trust for the 1886 Mdewakantons and did not give the 1886 Mdewakantons vested ownership rights in the lands purchased with those funds. Instead, according to the government, the Appropriations Acts simply gave the Secretary of the Interior the right to purchase land or other assets to be used, subject to the Secretary's discretion, for the benefit of the 1886 Mdewakantons and their families. In the government's view, the Secretary exercised his discretion to allow the 1886 Mdewakantons and their descendants to use and occupy the land, but neither the Appropriations Acts nor any action by the Secretary conveyed any greater interest, such as legal or equitable title, on any of the beneficiaries, either individually or as a class. In addition, the government argued that after Congress in 1980 enacted legislation providing that the 1886 lands would be held in trust for the three Mdewakanton communities, the lineal descendants of the 1886 Mdewakantons retained no rights in the lands except insofar as they were enrolled members of one of the three communities or were current

assignees whose rights were preserved under the 1980 Act's savings clause.

After considering submissions from the parties and the three Indian communities,[4] the trial court concluded that the plaintiffs were correct in their contention that the Appropriations Acts created a trust relationship between the government and the 1886 Mdewakantons, that the trust relationship extended to the descendants of the 1886 Mdewakantons, and that the trust had the effect of bestowing equitable title to the 1886 lands on the beneficiary class. *Wolfchild I,* 62 Fed.Cl. at 540-43, 551, 549, 551. The court also ruled that the 1980 statute that required the government to hold the 1886 lands in trust for the three Indian communities did not have the effect of altering or terminating the trust that was established by the Appropriations Acts. *Id.* at 543-44, 551. Accordingly, the court concluded,

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[4] The three communities have not all taken the same position in this litigation. Two of the communities, the Shakopee Mdewakanton Sioux Community and the Prairie Island Indian Community, participating as amici curiae, are aligned against the plaintiffs. The third community, the Lower Sioux Indian Community, participating as an appellee, is aligned with the plaintiffs. The Lower Sioux Indian Community has explained that the most profitable casinos are on the properties of the other two communities. That may account for the decision of the Lower Sioux Indian Community, many of whose members claim to be lineal descendants of the 1886 Mdewakantons, to support the plaintiffs rather than advocating that each of the three communities is entitled to beneficial ownership of the portions of the 1886 lands allocated to it in 1980.

the 950 acres that were purchased with the funds appropriated under the three Appropriations Acts continued to be held in trust for the heirs of the 1886 Mdewakantons, and the government breached its fiduciary duties to the plaintiffs respecting that trust. *Id.* at 545, 551.

The court's rulings that the Appropriations Acts created a trust for the loyal Mdewakantons and their descendants and that the 1980 statute did not terminate that trust are central to the plaintiffs' breach-of-trust claim and are critical prerequisites to any further proceedings in the trial court, such as identifying which plaintiffs are entitled to relief and calculating the measure of damages due to various groups of plaintiffs. Accordingly, the trial court certified the following two questions for immediate review by this court pursuant to 28 U.S.C. § 1292(d)(2):

> (1) Whether a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriations Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus; and
>
> (2) If the Appropriations Acts created such a trust, whether Congress terminated that trust with enactment of the 1980 Act.

We agreed to permit an appeal to be taken from the trial court's order, and we now undertake to answer the two certified questions.

II

Although the 1888, 1889, and 1890 Appropriations Acts make no reference to a trust, the trial court held that those statutes created a trust for the Mdewakantons who were living in Minnesota in 1886 and their descendants. The court ruled that all of the elements of a trust were present in the Appropriations Acts and that the absence of the term "trust" from the Acts was not fatal to interpreting them as imposing trust responsibilities on the government. The court regarded the corpus of the trust as the lands purchased with the funds appropriated pursuant to the Appropriations Acts. It found the beneficiaries to be sufficiently identified as the 1886 Mdewakantons and their families, including their descendants. It held that the trust obligations were sufficiently defined by the statutory requirements that the appropriated funds be expended for the benefit of the 1886 Mdewakantons and that they be expended, as nearly as practicable, so that each of the beneficiaries would receive a roughly equal amount in value from the expenditure of the appropriated funds. Finally, the court concluded that, as a consequence of the creation of the trust relationship, legal title to the 1886 lands remained in the United States, but the 1886 Mdewakantons and their descendants obtained equitable title to the lands. *Wolfchild I,* 62 Fed.Cl. at 540-43.

While it is true that a statute need not contain the word "trust" in order to create a trust relationship, the failure to use that term gives rise to

doubt that a trust relationship was intended. *See Cohen's Handbook of Federal Indian Law* § 5.05[1][b], at 429-30 (Nell Jessup Newton et al., eds., 2005) ("[W]hile the presence of the word 'trust' in a statute by itself is neither necessary nor sufficient to create a compensable claim, statutory or regulatory language using terms normally associated with trust or fiduciary law will be given great weight in the analysis."); *see also United States v. White Mountain Apache Tribe,* 537 U.S. 465, 480-81, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003) (Ginsburg, J., concurring) (distinguishing between a statute that "expressly and without qualification employs a term of art ('trust') commonly understood to entail certain fiduciary obligations" and a statute that contained no trust language and "lacked the characteristics that typify a genuine trust relationship"). That is particularly true where, as here, Congress used the term "trust" in other contemporaneous statutes dealing with the same subject matter, but did not use that term or any close proxy in the Appropriations Acts. *See, e.g.,* General Allotment Act of 1887, ch. 119, § 5, 24 Stat. 388, 389 (providing that United States will hold allotted land "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made"); Act of May 1, 1888, ch. 213, art. 6, 25 Stat. 113, 115 (United States to hold land "in trust"); Act of Mar. 2, 1889, ch. 405, § 11, 25 Stat. 888, 891 (same).

The Restatement of Trusts sets forth the general principle of trust law that a trust is created "only if the settlor properly manifests an intention to create a

trust relationship." *Restatement (Third) of Trusts* § 13 (2003). The Appropriations Acts manifest no such intention on the part of Congress. Although the Appropriations Acts impose some limited restrictions as to how the appropriated funds are to be spent, those restrictions are consistent with the kinds of directions that are routinely contained in appropriations statutes dictating that the appropriated funds are to be spent for a particular purpose. The simple statutory directives as to the expenditures authorized by the Appropriations Acts do not evidence an intention on Congress's part to create a legal relationship between the Secretary of the Interior and the 1886 Mdewakantons in which the Secretary was assigned particular duties as trustee and the Mdewakantons were given enforceable rights as trust beneficiaries. If the minimal directives given to the Secretary as to the expenditure of funds were sufficient to convert the Appropriations Acts into trust instruments, it would seem that other similar, contemporaneous appropriations for the support of other groups of Indians could also be characterized as creating trust responsibilities, even though in none of those instances is there any objective evidence of congressional intention to create a trust.

Each of the three provisions that authorized expenditures for the 1886 Mdewakantons was enacted as part of a much longer statute that contained appropriations for payment of the expenses of the Indian Department and for the support of certain Indian tribes. The provisions effecting an

appropriation for the Indian Department and those authorizing support for particular groups of Indians contained no language suggestive of a trust relationship. It is difficult to read the paragraphs relating to the 1886 Mdewakantons as creating a trust relationship when the surrounding paragraphs of the same statutes, which provide for the support of other groups of Indians, are clearly just appropriation provisions that do not create trust obligations. *See, e.g.*, Act of June 29, 1888, ch. 503, 25 Stat. at 230 ("For support and civilization of the Chippewas of Lake Superior, to be expended for agricultural and educational purposes, pay of employees, purchase of goods and provisions, and for such other purposes as may be deemed for the best interests of said Indians, five thousand dollars"); Act of Mar. 2, 1889, ch. 412, 25 Stat. at 995 ("To enable the Secretary of the Interior to purchase subsistence and other necessaries for the support of the Hualapais Indians in Arizona, seven thousand five hundred dollars"); Act of Aug. 19, 1890, ch. 807, 26 Stat. at 352 ("For support and education of the Seminole and Creek Indians in Florida, for the erection and furnishing of schoolhouses, for the employment of teachers, and for the purchase of seeds and agricultural implements and other necessary articles, six thousand dollars; this money, or any part of thereof, may be used, in the discretion of the Secretary of the Interior, for the purchase of land for homes of said Seminole Indians").

The only significant difference between the Appropriations Acts and the other Indian "support" appropriations that were part of the same legislation is that the latter two Appropriations Acts contained a requirement that each of the beneficiaries "shall receive, as nearly as practicable, an equal amount in value of this appropriation." That clause, which the record materials suggest was added because of complaints that the funds from an earlier appropriation were disproportionately distributed, provides such minimal direction that it is plainly insufficient to convert what would otherwise be an appropriation into a trust.

The 1889 Act provided that any appropriated funds from that Act or the 1888 Act that were not spent during the current fiscal year "shall, notwithstanding, be used and expended for the purposes for which the same amount was appropriated and for the benefit of the above-named Indians." Act of Mar. 2, 1889, 25 Stat. at 992. Although the trial court concluded that the presence of that carry-over provision in the 1889 Act helped demonstrate Congress's intent to create a trust for the Mdewakantons, the contemporaneous history of the provision actually supports the contrary inference. The provision was included in the 1889 Act, apparently without comment, but when the same language was proposed to be included in the 1890 Act, it was removed after members of Congress objected that it would be "remarkable" to include such a provision in an appropriations bill. 21 Cong. Rec. 7586 (1890)

(remarks of Sen. Cockrell). The fact that Congress removed the carry-over provision from the 1890 Act because it was deemed to be inappropriate for an appropriations bill supports the government's argument that Congress viewed the Mdewakanton clauses of the Appropriations Acts as ordinary appropriations provisions.

The Lower Sioux Indian Community argues that the placement of the Appropriations Acts under the heading "Fulfilling Treaty Stipulations with and Support of Indian Tribes" indicates that those appropriations conveyed equitable title to the 1886 lands to the loyal Mdewakantons and their descendants. *See Quick Bear v. Leupp,* 210 U.S. 50, 77, 80, 28 S.Ct. 690, 52 L.Ed. 954 (1908) (distinguishing between Indian funds appropriated under the heading "Fulfilling Treaty Stipulations with and Support of Indian Tribes," which were administered on behalf of the Indians by the government, with funds appropriated under the subcategory "Support of Schools," which constituted a mere gratuitous appropriation of public monies). Unlike the appropriation at issue in *Quick Bear,* however, the Appropriations Acts were not enacted pursuant to any treaty with the Mdewakantons, and therefore cannot fairly be characterized as "payment . . . of a treaty debt in installments." *See id.* at 81, 28 S.Ct. 690. Furthermore, although the Appropriations Acts were not placed in the sections entitled "Miscellaneous Supports," each of the three expenditures was explicitly appropriated "[f]or the support of" loyal Mdewakantons. *See* 25 Stat. at 228; 25 Stat.

at 992; 26 Stat. at 349. That is not the language typically used in clauses directed at fulfilling treaty obligations, and it is in fact analogous to the language used in the expenditures deemed to be gratuitous appropriations in the *Quick Bear* case. *See Quick Bear,* 210 U.S. at 77, 28 S.Ct. 690. Thus, the placement of the Mdewakanton clauses in the Appropriations Acts does not support the contention that the Appropriations Acts constituted a conveyance of trust property.

Finally, nothing in the legislative history of the three provisions at issue in this case indicates that they were designed to create a trust relationship. Instead, the sponsors of the special provisions for the Mdewakantons referred to them as the intended "beneficiaries of this appropriation," 18 Cong. Rec. 2977 (1888) (remarks of Rep. McDonald), and characterized the payment as "a gratuity to these peaceable Indians, because they were peaceable and because they suffered at the hands of other Indians on account of their loyalty to the United States," 21 Cong. Rec. 7587 (remarks of Sen. Dawes), and "a gratuity to the amount stated in this bill to these Indians who have thus remained faithful to civilization and humanity in the most trying period which the people of my State were ever called upon to go through," 21 Cong. Rec. 7588 (1890) (remarks of Sen. Dawes). The language and context of the Appropriations Acts thus strongly support the view that those provisions constituted simple appropriations, and did not create a trust relationship.

Recognizing that the language and legislative history of the Appropriations Acts do not provide compelling evidence that the Acts created a trust, the trial court based its decision principally on the context in which the Acts were enacted and on the contemporaneous and subsequent treatment of the 1886 lands by the Department of the Interior and Congress. *Wolfchild I,* 62 Fed.Cl. at 541-43. We have examined all of the legislative and administrative materials referred to by the court and called to our attention by the parties. While the legal issue is a complex one and untangling the historical materials is difficult, we conclude that the Appropriations Acts are best interpreted as merely appropriating funds subject to a statutory use restriction, and not creating a trust relationship through which the 1886 Mdewakantons and their descendants obtained beneficial ownership rights in the 1886 lands.[5]

The analysis of this issue is further complicated by the fact that, in the years between 1888 and 1980,

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[5] Because certain terms have been used inconsistently by different sources and at different times, we wish to make clear at the outset that when we use the terms "equitable" or "beneficial" title or ownership with respect to land that is held in trust, we refer to the trust beneficiary's ownership of all interests in the land except for legal title. The plaintiffs in their complaint use the term "equitable title" for that purpose, *see* Fifth Amended Complaint ¶ 8, and the trial court has used that term most of the time, *see Wolfchild I,* 62 Fed.Cl. at 534, 540, 543, 549, with some variation, *see Wolfchild v. United States,* 72 Fed.Cl. 511, 528 (2006) ("equitable interest"); *id.* at 532 ("beneficial owner").

Interior Department officials at times characterized the 1886 lands as being held in trust for the 1886 Mdewakantons and their descendants. What is important, however, is not what terms were used to refer to the relationship between the government and the beneficiaries of the Appropriations Acts, but the substance of what Congress did through the Appropriations Act and what, if any, property interest the beneficiaries obtained in the 1886 lands as a result. On that issue, as we shall see, the Interior Department's policy remained unchanged from the 1890s until 1980. The Department's consistent position was that the United States owned those lands and that the 1886 Mdewakantons and their descendants who were assigned plots from the 1886 lands were limited to temporary use and occupancy of those plots. For the reasons discussed below, we conclude that the Interior Department's position is correct – that the 1886 Mdewakantons and their descendants never obtained vested rights in the 1886 lands. In short, nothing in the Appropriations Acts or the conduct of the Interior Department had the effect of conveying equitable title in the 1886 lands to the 1886 Mdewakantons and ultimately to their lineal descendants.

A

The trial court noted that in the 1863 statute that first acknowledged the contributions of the loyal Mdewakantons during the Sioux uprising, Congress authorized the conveyance of land for "each

individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians." Act of Feb. 16, 1863, 12 Stat. at 654. The 1863 statute provided that the property "shall not be aliened or devised, except by the consent of the President of the United States, but shall be an inheritance to said Indians and their heirs forever." *Id.* That language clearly would have created an inheritable beneficial interest in the recipients of any land conveyed under the statute. The trial court regarded the 1863 statute as relevant to the proper interpretation of the Appropriations Acts, which were enacted 25 years later, stating that the 1888 Act was "motivated in part by the fact that the 1863 Act was not successfully implemented." *Wolfchild I,* 62 Fed.Cl. at 542.

While Congress's motivation to assist the loyal Mdewakantons no doubt derived in part from the failure of earlier efforts at assistance, it is clear that Congress did not use the 1863 statute as a model for the Appropriations Acts. To begin with, there is a significant difference between the language used in the 1863 statute and the language used in the Appropriations Acts. The 1863 statute referred solely to allotments of land, while the Appropriations Acts referred to the purchase of a wide variety of assets within the discretion of the Secretary of the Interior. Moreover, the first of the two 1863 statutes expressly stated that the beneficiaries would obtain an inheritable interest in the allotted lands, while the Appropriations Acts say nothing about the nature of

the ownership interest in any of the purchased lands. Those differences strongly suggest that Congress intended an approach in the Appropriations Acts different from the approach used in the first 1863 statute.

Even more telling is that the second of the two 1863 statutes, which was enacted only two weeks after the first and superseded it, merely authorized the Secretary to assign land to those who had assisted the white settlers during the uprising; it did not prescribe any particular form of ownership interest in the properties. Instead, it pointedly left open the nature of the interest that the assignees would have in the lands, stating that the lands would be "held by such tenure as is or may be provided by law." Thus, the failure of the 1863 Acts cannot be viewed as leading Congress to create permanent ownership interests in the 1886 lands along the same lines set forth in the first 1863 statute, because the second of the two 1863 Acts left the question of ownership open to later resolution. That approach, of postponing resolution of the ownership question, is the same as the interpretation the Interior Department was later to accord to the Appropriations Acts with respect to the ownership of the 1886 lands.

The plaintiffs point to the references in two of the Appropriations Acts (the 1889 and 1890 Acts) to the "family" or "families" of the 1886 Mdewakantons as suggesting that the Appropriations Acts were intended to create vested ownership rights in the purchased land, as was explicitly proposed in the first

1863 statute. The language of the Appropriations Acts, however, makes clear that the references to the Mdewakantons' families was not directed at creating rights of inheritance in the properties purchased, but instead was simply part of the directive to the Secretary as to the scope of his discretion in spending the appropriated funds. The 1890 statute, for example, directed that the funds were to be spent on such items as lands, agricultural implements, buildings, cattle, horses, food, or clothing "as may be deemed best in the case of each of these Indians or families thereof." Act of Aug. 19, 1890, ch. 807, 26 Stat. at 349. That language makes clear that the authorization for expenditures extended to cover the needs of the families of the beneficiaries, not simply the needs of the beneficiaries themselves. It does not speak to the nature of the interest created in any real property purchased with the funds.

The events immediately preceding the Appropriations Acts shed light on the nature of the course Congress chose in the Appropriations Acts and the reasons for its choice. In the years shortly before the enactment of the Appropriations Acts, Congress had authorized the transfers of land to individual Indians in two different ways. In the General Allotment Act of 1887, ch. 119, 24 Stat. 388, Congress authorized the Interior Department to grant individual Indians permanent interests in land, with the proviso that the conveyances would be subject to a 25-year restriction on alienation during which time the United States would hold the land in trust for the recipients. At the

expiration of the trust period, the Act provided, "the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance [sic] whatsoever." 24 Stat. at 389. Significantly, even though the first of the Appropriations Acts was enacted only a year after the General Allotment Act, and with respect to the same subject matter as the first 1863 statute, the Appropriations Acts differed from those two predecessors in that it contained no reference to the creation of trust responsibilities or rights of inheritance in the purchased lands.

Also relevant to an assessment of Congress's intentions as to the interests to be conveyed under the Appropriations Acts are the immediately preceding 1884, 1885, and 1886 statutes that sought to make provision for the loyal Mdewakantons. Those statutes used language similar to the language used in the Appropriations Acts, and neither Congress nor the Interior Department gave any indication that they regarded that language as mandating the creation of a trust relationship. In fact, the Interior Department elected to convey the lands purchased with the 1884, 1885, and 1886 funds to the beneficiaries in fee, although it promptly became clear that the fee transfers failed of their purpose when the recipients sold or encumbered the property.

Thus, at the time of the Appropriations Acts, Congress had two recent models before it for conveying land rights to the 1886 Mdewakantons, one of which explicitly created a trust relationship and one

of which plainly did not. In drafting the Appropriations Acts, Congress chose the more flexible language that did not expressly create a trust relationship. In this context, the best reading of the Appropriations Acts is that Congress did not elect to create a trust relationship, but instead chose language simply authorizing the expenditure of funds for a particular purpose, with the Secretary of the Interior being given broad discretion to select not only which items to purchase but also, implicitly, what type of interest to convey in any lands that might be purchased with the appropriated funds.

The Interior Department recognized, of course, that Congress intended the 1886 Mdewakantons to be the specific beneficiaries of the Appropriations Acts. The Secretary of the Interior accordingly sought to ensure that the funds appropriated under the Act would be spent for the benefit of those individuals. With respect to funds that were used to purchase land (as opposed to personal property that was rapidly consumed), the Secretary adopted a policy designed to promote Congress's intent by assigning the land to individuals from within the group of 1886 Mdewakantons and subsequently to individuals from within the class of the descendants of those Mdewakantons.

Contemporaneous documents make clear that the Secretary of the Interior considered himself bound by the terms of the statutes to reserve the usage of the 1886 lands for members of the particular beneficiary class (the 264 individuals determined by

a contemporaneous Interior Department census to constitute the 1886 Mdewakantons), and that he did so by selecting assignees from within that group. Later, in the absence of any congressional direction as to the ultimate disposition of ownership interests in the lands, the Secretary selected successor assignees from the class of lineal descendants of those beneficiaries. In both instances, the Secretary held the property for the use and benefit of individuals selected from a defined class.

Nothing in the text of the Appropriations Acts effected or required the conveyance to any particular Mdewakanton of a permanent interest in the 1886 lands, such as equitable title. Nor did the Interior Department treat the Appropriations Acts as creating any such interest. Although the descendants of an assignee were typically awarded assignments of property after the death of the previous assignee, that practice was not universal, and the descendants were not regarded as having a legal right to that successor assignment. Indeed, to hold that each of the descendants of the 1886 Mdewakantons obtained a small, undivided ownership right in each of the properties purchased with the Appropriations Acts funds – the right that the plaintiffs' theory of this case suggests they are entitled to – would have defeated the purpose of the original legislation by making it difficult, if not impossible, to maintain the practice of assigning the relatively small plots of the 1886 lands by assigning the plots sequentially to successor assignees. The purpose of the legislation

was to provide plots large enough for residential and agricultural purposes, and the assignment practice was designed to keep those plots intact, not to continue subdividing them as the number of descendants grew or to force their sale in order to distribute the sale proceeds among numerous competing claimants.

The fact that the Secretary adopted a policy of assigning plots of the 1886 lands to the descendants of the 1886 Mdewakantons does not conflict with the government's position that the descendants of the 1886 Mdewakantons did not hold equitable title to the 1886 lands. To the contrary, as we discuss below, the evidence as to the policy and practice of the Interior Department with regard to the 1886 lands over the years demonstrates that the Department did not regard the 1886 Mdewakantons and their descendants as the beneficial owners of those lands.

B

In the years immediately following the Appropriations Acts, the Interior Department began assigning parcels of the 1886 lands to individual Mdewakantons. As early as 1889, the Secretary of the Interior set forth the Department's policy with respect to the beneficiaries' rights in the assigned properties. In a letter to the Commissioner of Indian Affairs, the Secretary instructed that after appropriate purchases of land had been made and the particular qualifying beneficiaries selected, the plots should be assigned "with a form certificate of

occupancy." The Secretary envisioned that the certificate would provide that the assignee was being awarded the use of the land with title being reserved in the United States. The Secretary added that a patent to the land might be issued "with such limitations as shall be required by law, at such time hereafter as shall be authorized by the statutes." Thus, the Secretary concluded that the issue of "further conveyance thereof to the Indians" would be left "subject to such further determination as may be authorized by law." By that means, the Secretary noted, "the Indians will not be able to dispose of or incumber [sic] said lands, and title can be withheld from those, if any, who fail to occupy and make proper use of the portion assigned to them." With the question of the ultimate ownership of the lands left subject to later legislative action, for the time being all that was to be conveyed to the 1886 Mdewakantons was a temporary right of occupancy.[6]

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[6] Based on an 1899 letter from the Acting Commissioner of the Office of Indian Affairs, which refers to the 1886 lands as being "held in trust for [the 1886 Mdewakantons]," the plaintiffs argue that the Interior Department recognized from the outset that the Appropriations Acts create a trust relationship with the 1886 Mdewakantons. The 1899 letter, however, is entirely consistent with the Secretary's earlier articulated policy and does not support the plaintiffs' contention that the 1886 Mdewakantons had obtained a vested interest in the 1886 lands. The letter does not suggest that the beneficiaries of the Appropriations Acts enjoyed equitable ownership of the lands or any interest other than the right of occupancy and use. To the contrary, the letter stated, in accordance with the Secretary's 1889

(Continued on following page)

That remained the policy of the Interior Department throughout the period between 1888 and 1980. According to a 1904 report, most of the purchased lands had already been assigned to individual qualifying Mdewakantons, although the early assignments were not documented by certificates as the Secretary had instructed. By the early part of the twentieth century the lands that had been purchased with the Appropriations Acts funds had been divided into 89 parcels and had been assigned to selected individuals from among the 1886 Mdewakantons.

Beginning in 1905, the Department formalized the assignments through documents known as Indian Land Certificates. Those documents authorized each assignee to reside on or use the land either for his lifetime or until he abandoned the land. When a particular assignment ended, either by the death of the assignee or when the assignee abandoned the land or otherwise violated the terms of the assignment, the Interior Department would select another assignee for the plot in question. Frequently, the Interior Department would assign a plot to the child of the previous assignee, but sometimes another descendant of the 1886 Mdewakantons would be

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letter, that "the title to all the land purchased [by an Interior Department agent under the Appropriations Acts] is still vested in the United States . . . and that in all probability steps will be taken at an early day looking to the allotment of said lands by the Department to such Indians as the late Agent has designated."

given the assignment. In some instances, the lands were leased to persons other than the descendants of the 1886 Mdewakantons, in which cases the lease proceeds were kept in an account for the 1886 Mdewakantons and their descendants.

The Indian Land Certificates that were issued to document the assignment of the 1886 lands stated that the property was held "in trust, by the Secretary of the Interior, for the exclusive use and benefit of the said Indian, so long as said allottee or his or her heirs occupy and use said land."[7] In the event that the beneficiary should abandon the land, the certificates provided that the land would be "subject to assignment by the Secretary of the Interior to some other Indian who was a resident of Minnesota May 20, 1886, or a legal descendant of such resident Indian." The trial court concluded that the language of those certificates supports the interpretation of the Appropriations Acts as dictating that the 1886 lands were to be held in trust for the 1886 Mdewakantons and their descendants as trust beneficiaries, and that the beneficiaries were accorded equitable ownership rights in the 1886 lands. *Wolfchild I,* 62 Fed.Cl. at 541-42; *Wolfchild II,* 68 Fed.Cl. at 791.

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[7] Some of the later-issued certificates, which are included in the record, omitted the use of the term "trust" and instead stated that the assignee "is entitled to immediate possession of the land for his or her lifetime, as long as he or she shall occupy and use the land," with the assignment being nontransferable and subject to cancellation if the assignee ceased to use and occupy the property as his or her principal place of residence.

We do not interpret the Indian Land Certificates in that manner. While it is true that the Indian Land Certificates used the term "trust" and referred to the assignee "and [his or her] heirs" as being "entitled to immediate possession of said land," the certificates did not state that they conveyed or reflected the conveyance of vested interests in the assigned lands. Instead, they referred to the conveyed interest as only the right of occupancy and use.

The interpretation of the Indian Land Certificates as conveying only the right of temporary occupancy and use is supported by this court's decision in *Cermak v. Babbitt*, 234 F.3d 1356 (Fed.Cir.2000), another case dealing with the rights of the 1886 Mdewakanton descendants in the 1886 lands. In *Cermak*, we stated that the record "reveals that the Secretary elected to convey only temporary use and occupancy rights to individual Indians and used Indian Land Certificates to effect the assignment of these rights." *Id.* at 1363. Although this court's specific holding in *Cermak* – that the Appropriations Acts did not result in allotments of the 1886 lands under the General Allotment Act – is not squarely dispositive of the argument made by the plaintiffs in this case, the court's conclusion that the 1886 Mdewakantons obtained "only temporary use and occupancy rights" in the 1886 lands provides support for the government's position that the Indian Land Certificates did not convey or document the conveyance of beneficial ownership of the 1886 lands.

The district court in *Cermak v. Norton*, 322 F.Supp.2d 1009 (D.Minn.2004), *aff'd*, 478 F.3d 953 (8th Cir.2007), reached the same conclusion. There, the same plaintiffs again challenged the Interior Department's decision that the assignment of two plots from the 1886 lands to their ancestor, John Cermak, conveyed only a life interest in that property and did not give them rights of inheritance with respect to those lands. The court concluded that the Interior Department's position – that the 1886 land assignees obtained no beneficial interest in the assigned lands – had been consistent and constituted a reasonable interpretation of the pertinent statutes. 322 F.Supp.2d at 1015. The Eighth Circuit affirmed, noting that the Interior Department's longstanding policy had been that the Indian Land Certificates bestowed only a temporary tenancy conditioned on personal occupancy and use, "rather than an ownership interest that the Certificate holder's heirs may inherit." 478 F.3d at 957.

Finally, in administrative adjudications, the Interior Department construed the Indian Land Certificates in the same way. *See Brewer v. Acting Deputy Assistant Sec'y – Indian Affairs*, 10 I.B.I.A. 110 (1982); *In re Estate of Gofas*, Indian Probate No. TC 389S-81, at 41-42 (Interior Office of Hearings and Appeals Oct. 26, 1990) ("despite the ambiguous language contained in the Indian Land Certificate form itself, the Bureau of Indian Affairs and the Department of the Interior have consistently interpreted this document as granting to the certificate holder

only a right of use and occupancy for life, subject to the conditions contained therein"). The Indian Land Certificates therefore do not establish that the assignees who held those certificates were trust beneficiaries who owned a beneficial interest in the 1866 lands.

C

In addition to relying on the text of the Indian Land Certificates, the plaintiffs point to various statements by Interior Department officials in which those officials referred to the relationship between the government and the 1886 Mdewakantons as having the character of a trust. It is true that there is some variation in the way that Interior Department officials have characterized that relationship over the years. As we have noted, however, the label given to the relationship is not as important as the substance of the respective parties' rights. And as to that issue, the Interior Department's position has been consistent: The 1886 Mdewakantons and their descendants were eligible for assignments conveying temporary use and occupancy rights in the land, but they did not obtain vested rights that reflected beneficial ownership interests in the property.

In 1915, the Interior Department was forced to address the issue of the nature of the rights attendant to the assignments of the 1886 lands. That issue came to a head as a result of several inquiries concerning whether the assignments of portions of

the 1886 lands gave rise to an inheritable interest in the assigned plots. In one case, the original assignee occupied a small plot until his death. If the assignment were deemed a vested and inheritable interest, the plot would be divided among his three heirs. After some internal debate, the Interior Department concluded that the assignments did not create vested inheritable rights, that both legal and equitable title are in the United States, and that the Secretary of the Interior could select a successor assignee rather than being bound to dispose of the property in accordance with the laws of inheritance.

The position taken by the Interior Department in 1915 as to the ownership status of the 1886 lands is reflected in two memorandums signed off on by the Assistant Secretary. The first memorandum set forth the Department's position that the assignees of the 1886 lands "possessed no other title than a right of occupation of the lands involved, and, therefore, possessed no interest in said lands which was of the nature of an estate of inheritance." Under the Indian Land Certificates, according to the memorandum, the right conferred on the assignees was not a vested right, but was merely a tenancy at will that terminated with the death of the occupant. With respect to the ownership interests in the land, the memorandum stated the following (emphasis added):

> The Secretary of the Interior has not been authorized to hold these lands in trust for the Mdewakanton Sioux. These lands may not be disposed as trust lands. They may not

> be sold with the approval of the Secretary of the Interior, and *both legal and equitable title are in the United States.*

Accordingly, the memorandum concluded, the Secretary was not required to split up a small assigned tract among multiple heirs, but had discretion to assign the tract and could, for example, assign it to the particular heir who had "improved and lived on the tract and is willing to continue to do so."

A second memorandum issued later that year after further internal debate set forth the Department's intention to adhere to its policy of reassigning "the vacant tract in each case to the Mdewakanton Sioux Indian who appears to be most equitably entitled to have the temporary use and occupancy of it." That memorandum concluded that the Appropriations Acts "did not intend to sanction any vesting of a legal interest in these lands by the occupants"; rather, according to the memorandum, Congress intended for the land to be "disposed of in a manner which was deemed best by the Secretary of the Interior, and that he deemed it best not to dispose of any permanent interest in these lands pending further legislation which has not yet been enacted." In light of the fact that many of the tracts were very small – from three to seven acres – the memorandum observed that if the property had to be shared with numerous heirs of the former occupant, "it would result in much confusion and hardship, and practically in an ejectment of the Indian who is most equitably entitled to live on the land, or who may be

actually in possession, living upon it as his only home, and cultivating it to his best advantage." The memorandum noted that in many instances heirs not already living on the property "are amply provided for elsewhere," and many of them had left the area and therefore were not good candidates to continue the occupancy and use of the property.

The second memorandum, like its predecessor, rejected the suggestion that the assignees of land purchased under the Appropriations Acts obtained equitable title to that land. It noted that the preferred approach of making reassignments on equitable grounds rather than as a matter of inheritance had been used for years and had elicited very few complaints. Accordingly, the Department decided to continue reassigning the 1886 lands for temporary use and occupancy "until such time as additional legislation is procured authorizing allotments in severalty on such lands."

In the years following the 1915 policy determination, the Interior Department adhered to its position with respect to the ownership interests in the 1886 lands. For example, in 1933 when a question was raised as to the ownership rights to two of the 1886 tracts, the Department advised that title to the tracts was in the United States, "assignees or their heirs possessing only the right of occupancy and use," and that the lands "are not of an inheritable status." Similarly, in a 1937 decision regarding the reassignment of a tract that was abandoned by the assignee, the Department noted that the 1886 lands "were

purchased for the Indians by the United States. No trust is created in the deeds."

To be sure, the Interior Department has consistently recognized that in the original legislation Congress intended for the appropriated funds to be expended for the benefit of the 1886 Mdewakantons. Consistent with the principle that there is a "general trust relationship between the United States and the Indian people," *United States v. Mitchell,* 463 U.S. 206, 225, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983), Interior Department officials often characterized the 1886 lands as being held in trust for the 1886 Mdewakantons and their descendants, even though the 1886 Mdewakantons were not a tribe of Indians, but rather were viewed as a group of individuals who had severed their tribal relations and were in need of assistance. The Department made clear, however, that its treatment of the 1886 lands as held in trust status for the 1886 Mdewakanton descendants did not give those beneficiaries any interest other than a potential right of temporary occupancy and use of the lands. And the Department recognized that the lands had been acquired by the United States in fee with no formal trust designation. For example, a 1970 Interior Department memorandum stated that the original legislation authorized the purchase of lands to be used for the benefit of the 1886 Mdewakantons "without trust designation or other limitation in title." The memorandum concluded that in accordance with the original legislative purpose the lands should remain available only for the use of "qualified

Mdewakanton Sioux Indians." To change the status of the lands, it added, "Congress should be asked to permit such action by affirmative legislation."

A 1974 opinion letter from the Solicitor's office at the Interior Department sets forth the most definitive statement of the Department's position as to the legal status of the 1886 lands shortly before the enactment of the 1980 statute. The opinion letter noted that the legal title to the 1886 lands was taken by the United States, that tenancies at will, or defeasible tenancies, were granted in the form of land assignments to members of the beneficiary class (the 1886 Mdewakantons and their descendants), and that in some instances leasehold interests had been granted to non-members of the beneficiary class, with the income being expended for the benefit of reservation communities "in which members of the beneficiary class reside or with which they are affiliated." The opinion letter concluded that the lands were best viewed as being held by the United States in trust, with the Secretary "possessing a special power of appointment among members of a definite class," and having the authority to grant an interest in the form of either a tenancy at will or a defeasible interest in the land. The opinion letter makes clear that its conclusion that the lands were held in trust did not mean that the 1886 Mdewakantons and their descendants owned equitable title to the 1886 lands. To the contrary, the opinion letter stated, "[w]hen the present arrangement was established, indications are that it was intended as a temporary arrangement and

a permanent legislative solution was contemplated." The opinion letter recommended that the Bureau of Indian Affairs "undertake to ascertain whether some legislative disposition of beneficial title to these lands consistent with the present situation is practical and can be recommended to the Congress."

The 1974 memorandum highlighted the point that the key question regarding the rights at issue in this case is not whether the 1886 lands were held "in trust" for the 1886 Mdewakanton descendants to whom they were assigned, but rather what rights were conferred in the assigned lands. Plaintiffs' theory is that the class consisting of the 1886 Mdewakantons and their lineal descendants obtained equitable title to the 1886 lands, such that each of them was legally entitled to a share of the proceeds of those lands. The government's theory is that the 1886 Mdewakantons were merely the intended beneficiaries of a congressional appropriation, and their descendants were merely the beneficiaries of an interim Interior Department policy designed to approximate Congress's purpose in the Appropriations Acts pending legislation settling the ownership issue. We conclude that the latter is the better view in light of the purpose of the Appropriations Acts and the subsequent history pertaining to the administration of the 1886 lands. In so doing, we think it significant that throughout the period between the enactment of the Appropriations Acts and the passage of the 1980 Act that directed that the 1886 lands be held in trust for the three communities, the Interior

Department's consistent position was that the lands were meant to be held in small plots for a small number of individual Mdewakantons living on or near the lands, not collectively for the entire class of Mdewakanton descendants, wherever they might be found.

In sum, we find no persuasive support in the history of the Interior Department's policies with respect to the administration of the 1886 lands that supports the plaintiffs' theory that the Appropriations Acts created permanent beneficial rights in the descendants of the 1886 Mdewakantons. Consistent Interior Department practice was to assign plots of those lands to individuals chosen from among the 1886 Mdewakantons and their descendants, but there was no suggestion in the administrative practice that the beneficiaries obtained equitable title or any other vested rights in those lands.

D

The plaintiffs argue that several twentieth-century statutes show that Congress intended to create a trust relationship with respect to the 1886 lands through which the descendants of the 1886 Mdewakantons obtained an undivided equitable interest in those lands and their proceeds. We conclude that the statutes on which the plaintiffs rely do not support their position.

The plaintiffs first point to a 1901 statute in which Congress authorized the sale of a small parcel

of the 1886 lands in Redwood County, Minnesota, and provided for the purchase of another parcel in exchange. The significance of that legislation, according to the plaintiffs, is that it required "the written consent of the adult Indians residing in Redwood County" before the sale could be effected. *See* Act of Feb. 25, 1901, ch. 474, 31 Stat. 805, 806. Invoking general principles of trust law – in particular the requirement that in some circumstances the consent of the beneficiaries is required to terminate a trust – the plaintiffs contend that the requirement of consent suggests that the property was being held in trust for the Indians. The plaintiffs also rely on the remarks of Senator Pettigrew regarding the legislation, in which he stated that the 1886 Mdewakantons were not a "band of Indians," but "are occupying separate tracts and have the title." 34 Cong. Rec. 2523 (1901).

The statutory requirement to obtain consent for the sale from the adult Indians in Redwood County does not demonstrate the existence of a trust. Instead, it appears simply to reflect congressional recognition that the 1886 lands were intended for the use of the 1886 Mdewakantons and that it was therefore appropriate to afford them the right to object to any proposed disposition of those lands. Indeed, the Senate report on the bill refers to the consent requirement and does not in any way suggest that it is tied to any requirements of trust law. *See* S.Rep. No. 56-2186, at 2 (1901). As for Senator Pettigrew's comment, his statement that the Mdewakantons "have the title" is not supported by

any analysis and is contrary to the position taken by the Secretary of the Interior contemporaneously with the enactment of the Appropriations Acts, as noted above. Absent any other evidence that the Mdewakantons "ha[d] the title" to the 1886 lands, Senator Pettigrew's statement simply appears to be in error.

The plaintiffs argue that subsequent Acts of Congress provide further proof that Congress understood that those lands were held in trust for the Mdewakantons and their descendants. In our view, those statutes provide no support for the plaintiffs' argument, and in fact support the contrary inference.

In 1906, Congress authorized the sale of a small portion of the 1886 lands on the condition that the proceeds of the sale be paid to the current assignees or that the proceeds be used for the purchase of lieu lands elsewhere. Act of Mar. 19, 1906, ch. 962, 34 Stat. 78. Nothing in the text of the statute states or suggests that either the particular assignees who occupied the property at the time or the 1886 Mdewakantons and their descendants in general had an ownership interest in the property. The two reports accompanying the legislation both recited that the land "belongs to the United States," and both added that the land "was at one time intended that it should be allotted to certain Indians, but it has never been so allotted." S.Rep. No. 59-1636, at 1 (1906); H.R.Rep. No. 56-1576, at 1 (1906).

Unlike the 1901 statute, the 1906 statute did not require the consent of the assignees (or anyone else) before effecting the transaction. Thus, whatever force the plaintiffs' argument about the consent requirement might have with respect to the 1901 statute, that argument is not applicable to the 1906 statute. In fact, the absence of any provision for obtaining the consent of any of the 1886 Mdewakantons undermines the plaintiffs' argument that Congress regarded the 1886 Mdewakantons as the equitable owners of the land. Congress's decision to compensate the particular affected assignees by giving them the proceeds from the sale or obtaining lieu lands in exchange for the sold property thus appears to be an effort to minimize the burden of depriving the particular assignees of their temporary use and occupancy of the property, not an acknowledgement that the class of 1886 Mdewakantons and their descendants held an ownership interest in the land.

A statute enacted in 1923 provides further evidence that Congress did not regard the Appropriations Acts as having conferred any ownership rights on the 1886 Mdewakantons and their descendants. In that statute, Act of Feb. 14, 1923, ch. 76, 42 Stat. 1246, Congress extended the provisions of the General Allotment Act of 1887 to the properties purchased with the Appropriations Acts funds, which had the effect of authorizing the Secretary of the Interior to allot the properties to particular individuals from among the 1886 Mdewakantons and their descendants. Significantly, the legislative history of the 1923

Act indicates that the 1886 Mdewakantons were not regarded as having any ownership interest in the property. To the contrary, in the letter recommending enactment of the legislation, the Acting Secretary of the Interior explained that the Appropriations Acts did not specifically indicate the manner in which title would be held to the 1886 properties, and noted that the "United States now holds the title in fee to all those lands." H.R.Rep. No. 67-1379, at 1 (1923). The letter continued, "The legal title to all the above purchased lands, as herein indicated, is in the United States, the Indians having the use and occupancy only." *Id.; see also* S.Rep. No. 67-129, at 1 (1921).

Furthermore, if the 1923 statute had been implemented, the effect would have been to allot the 1886 lands to a small number of the 1886 Mdewakantons – presumably those with assignments at the time. Such a step would have deprived the other members of the class of 1886 Mdewakanton descendants of any present or future interests in the 1886 lands. Accordingly, Congress's decision in 1923 to authorize the allotment of the 1886 lands is contrary to the plaintiffs' contention that they obtained vested rights in those lands through the Appropriations Acts.

Although the 1923 statute authorized the Secretary to make individual allotments of the 1886 lands, the Secretary elected not to do so. In the years following that Act, federal Indian policy changed from favoring individual allotments to supporting tribal self-determination, a policy change that culminated

in the enactment of the Indian Reorganization Act of 1934. It was under the authority of that Act that the three Mdewakanton communities were organized and reservations granted for them.[8]

The effect of that change in policy was manifested in a 1944 statute that authorized the Department of the Interior to purchase two small tracts of the 1886 lands for a Wildlife Refuge. The 1944 statute, Act of June 13, 1944, ch. 243, 58 Stat. 274, stated that the subject properties, which had been acquired pursuant to the Appropriations Acts for Indian use, were "no longer used by Indians." It then provided that as part of the transaction, a total of $1,261.20 would be made available for transfer on the books of the Treasury Department "to the credit of the Medawakanton and Wahpakoota Bands of Sioux Indians" and that the payment "shall operate as a full, complete, and perfect extinguishment of all their right, title, and interest in and to the lands above described." *Id.*

The plaintiffs argue that the payment and the reference to the "right, title, and interest" in the two

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[8] The plaintiffs have called our attention to the Supreme Court's recent decision in *Carcieri v. Salazar*, ___ U.S. ___, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009), which involved the construction of a provision of the 1934 Act. They contend that *Carcieri* supports their argument that the Appropriations Acts created a trust for the 1886 Mdewakantons and their descendants. We do not regard *Carcieri* as in any way relevant to that issue.

tracts of the 1886 lands indicates that Congress recognized an equitable interest in the 1886 lands. The problem with that argument is that the payment was made to a tribe, not to a group of individuals, and in particular not to the lineal descendants of the 1886 Mdewakantons. Thus, the 1944 statute demonstrates that Congress appreciated that the 1886 lands were purchased for the general purpose of benefiting the 1886 Mdewakantons, and that it was appropriate that some compensation be paid for the disposition of that property. But it is contrary to the conclusion that any particular individuals had obtained vested rights in that property as to which consent or compensation was legally required before the property was sold.

The most significant twentieth-century legislative action bearing on the status of the 1886 lands is, of course, the 1980 statute that terminated the assignment system and placed the 1886 lands in trust for the three communities. That statute and its legislative history make clear that Congress did not regard the Appropriations Acts as having conferred equitable title in the 1886 lands on the 1886 Mdewakantons and their descendants.

The committee reports on the 1980 legislation recognized that the 1886 lands were held by the United States for the use of the 1886 Mdewakantons and their descendants. *See* S.Rep. No. 96-1047, at 1-2 (1980); H.R.Rep. No. 96-1409, at 2 (1980). But the reports did not suggest that the 1886 Mdewakantons, either individually or collectively, held beneficial title to the 1886 lands. To the contrary, as the Senate

report noted, the lands were owned by the United States pursuant to an "unusual" arrangement under which the land was made available for assignment to eligible beneficiaries of the three Appropriations Acts. S.Rep. No. 96-1047, at 2. Because that arrangement did not give vested rights to the land to any of the descendants of the 1886 Mdewakantons, Congress was free to alter the ownership status of the land to create trusts for the three communities.[9] *See N. Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 656, 96 S.Ct. 1793, 48 L.Ed.2d 274 (1976); *United States v. Jim,* 409 U.S. 80, 82, 93 S.Ct. 261, 34 L.Ed.2d 282 (1972); *LeBeau v. United States,* 474 F.3d 1334, 1342-43 (Fed.Cir.2007).

It was clear to those who proposed the 1980 legislation that despite the overlap among the descendants of the 1886 Mdewakantons and the membership of the three communities, some of the 1886 Mdewakanton descendants would cease to be beneficiaries under the new statute. An Interior Department memorandum describing the effect of the

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[9] The sponsor of the 1980 Act in the House, Rep. Richard Nolan, explained that under the Appropriations Acts, the 1886 lands were "held by the United States for exclusive use by descendants of the May 20, 1886, Mdewakanton Sioux," unlike the reservation land, which "belonged to all Mdewakanton residing on each reservation, according to membership requirements stipulated by the tribe." 126 Cong. Rec. 8897 (Apr. 23, 1980) (remarks of Rep. Nolan). The 1980 Act, he explained, "will put [the 1886 lands] on an equal status with [reservation] land," and the "change in the legal status of the 1886 Mdewakanton land will place all Mdewakanton lands on an equal basis." *Id.*

proposed transfer of the 1886 lands to be held in trust for the three communities specifically acknowledged that, because of the lack of complete overlap between the membership of the communities and the descendants of the 1886 Mdewakanton, some individuals could lose the opportunity for occupancy and use of those properties under the proposed legislation. The memorandum stated:

> [T]here are, potentially, a number of Indian people who are eligible descendants entitled to use rights in this property but who are not members of any of the three Indian communities and would, therefore, not acquire any rights (they may in fact lose rights) by the proposed change in the title to this property. There is no provision in the Bill to protect any such property rights there may be.

That acknowledgement makes clear that the Interior Department understood that the rights of the Mdewakanton descendants were limited to eligibility for use and occupancy of the 1886 lands, not equitable ownership.[10] In fact, the "savings clause" that preserved occupancy rights for all those then holding

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[10] The plaintiffs argue that the quoted statement was in a document relating to a bill introduced in an earlier Congress. The earlier bill and the Act ultimately passed in 1980, however, were nearly identical. The process of obtaining the 1980 legislation was an ongoing one that simply spanned more than one Congress. The document is therefore properly viewed as part of the legislative history of the 1980 Act.

assignments to portions of the 1886 lands was added to the bill, perhaps in an effort to mitigate the effect of the new statute on those who were not members of the communities and would otherwise lose their current right of occupancy of the 1886 lands.

From our survey of the various statutes enacted in the aftermath of the Appropriations Acts, we see no evidence that Congress interpreted the Appropriations Acts as creating a trust relationship with the 1886 Mdewakantons. Nor do we see any indication that Congress wished, in the subsequent legislation, to convert the relationship between the government and the 1886 Mdewakanton descendants into a trust relationship in which the descendants would be treated as beneficial owners of the 1886 lands.

E

In addition to invoking subsequent legislation and administrative practice, the plaintiffs seek support for their position in several court decisions and in positions taken by government lawyers in previous cases involving the 1886 lands. None of those arguments is persuasive.

First, the plaintiffs and the Lower Sioux Indian Community rely heavily on the Court of Claims' decision in *Duncan v. United States,* 229 Ct.Cl. 120, 667 F.2d 36 (1981). That case involved a series of statutes that authorized the purchase of land for certain Indians in California. The first of those statutes authorized the Secretary of the Interior to

purchase lands and water rights for the use of the designated Indians, to construct suitable irrigation facilities on those lands, and to "fence, survey and mark the boundaries of such Indian Reservations." Act of June 21, 1906, Pub.L. No. 258, ch. 3504, 34 Stat. 325, 333 (1906). Subsequent statutes renewed the authorization in similar terms, and suitable property was purchased with the appropriated funds. In 1958, Congress enacted a statute that provided that the trust relationship with respect to the lands would be terminated under certain conditions and the land turned over to individual Indians. *See* Pub.L. No. 85-671, 72 Stat. 619 (1958). The Indians later filed an action for breach of trust, contending that the government had not satisfied the statutory requirements for termination of the trust. The Court of Claims ruled that the California lands were held in trust for the Indians and that the government was liable for breach of trust because of its unauthorized, premature termination of the trust.

The plaintiffs contend that the land purchases in this case and the purchase at issue in the *Duncan* case are very similar, and that the purchases in this case therefore must be treated as creating the same kind of trust relationship that was found to exist in *Duncan*. While there are some similarities between the two cases, there are important differences that make the *Duncan* case distinguishable. First, the initial statutes in *Duncan* expressly authorized the Secretary to procure land for the creation of "Reservations" for the Indians, a term that is typically

associated with the creation of a trust relationship between the government and the tribe or community of Indians for which the reservation is created. *See Cohen's Handbook of Federal Indian Law* §§ 3.04[2][c], at 191; 15.04[3][b], at 982; *see also N. Paiute Nation v. United States,* 8 Cl.Ct. 470, 485 (1985). Second, as the *Duncan* court pointed out, the "contemporaneous and continuing interpretation" of the authorizing statutes by the Interior Department was that those statutes created a trust relationship. In fact, the parties' agreed statement of facts contained a stipulation that from the time of the creation of the reservation until its termination, "the Secretary of the Interior recognized a federal trust relationship with the Robinson or East Lake Band, as a distinct Indian tribe or band of Indians." 667 F.2d at 41 n. 7. Third, in the 1958 statute that authorized the termination of the reservation, Congress clearly stated its understanding and intention that the reservation lands in question had been and would continue to be held in trust until final termination. *See* Pub.L. No. 85-671, § 9, 72 Stat. at 621 (providing for certain benefits to be conferred "[p]rior to the termination of the Federal trust relationship in accordance with the provisions of this Act").

None of those factors is present here. The Appropriations Acts did not create a reservation for the 1886 Mdewakantons; there was no consistent and longstanding position by the Interior Department that the Appropriations Acts created a trust giving the descendants of the 1886 Mdewakantons vested

rights in the 1886 lands; and the 1980 statute that terminated the relationship created by the Appropriations Acts not only did not refer to that relationship as a trust relationship, but created an entirely different, and inconsistent, trust relationship with the three Mdewakanton communities. *Duncan* therefore does not control this case.

The plaintiffs also rely on a 1922 decision by the Court of Claims, *Medawakanton and Wahpakoota Bands of Sioux Indians v. United States,* 57 Ct.Cl. 357 (1922). That case arose after Congress enacted a statute in 1917 directing that the Sioux be awarded a back payment for the annuities that had been revoked by the 1863 legislation. Act of Mar. 4, 1917, ch. 181, 39 Stat. 1195. The 1917 statute directed that the amount of the back payment be reduced by any amounts that had been paid to the tribe and tribal members for their support in the interim. Among the set-off payments were the payments made pursuant to the Appropriations Acts. Nothing in that legislation or the court's judgment indicates that the monies were paid as part of a trust; they were simply funds that were previously paid to the tribe and to former tribe members and, as such, fell within the scope of what Congress had directed to be set off from the overall judgment in that litigation.

Finally, the plaintiffs argue that the government is estopped from denying that the Appropriations Acts created a trust relationship with the 1886 Mdewakantons and their descendants because government attorneys have acknowledged the existence

of such a trust in earlier litigation. We have examined the statements relied on by the plaintiffs and do not find anything said by the government attorneys in the referenced cases that would support the plaintiffs' claims in this one. In one instance, the government noted that the Indian Land Certificates documenting the assignments held by particular descendants of the 1886 Mdewakantons referred to the assigned land as "held in trust." Government counsel then stated that the 1980 legislation "changed the status of property represented by Indian Land Certificates" by transferring "property that the United States had held in trust for individual Mdewakanton Sioux, to the Sioux Community." In other instances, again referring to the Indian Land Certificates, government counsel stated the assigned lands were held in trust for individual Mdewakanton Sioux. That characterization of the property relationship reflected by each assignment is consistent with the way the Interior Department frequently characterized the assignments, but it falls far short of endorsing the plaintiffs' position that the United States held the 1886 lands in trust for the class of the 1886 Mdewakanton descendants and that the trust relationship rendered the members of that class equitable owners of those lands.

In another instance cited by the plaintiffs, a government attorney stated that the 1980 law "said we're not changing anybody's existing rights." In context, it is clear that the attorney's statement referred to the effect of the savings clause of the 1980 Act in

preserving the rights of existing assignees, not to the overall effect of the Act in giving beneficial title to the three communities.

In sum, we conclude that, as of the time of the 1980 Act, all indications were that neither Congress nor the Department of the Interior had conveyed any vested ownership rights in the 1886 lands, legal or equitable, to anyone. Instead, those lands were being held by the Department of the Interior for use by the 1886 Mdewakantons and their descendants pending an ultimate legislative determination as to how the ownership interests in the lands should be allocated. That determination came in 1980, when Congress provided that legal title in the lands would be held by the United States, which would hold the lands in trust for the three communities. For that reason, we conclude that the answer to the first of the certified questions in this case – whether the Appropriations Acts created a trust for the benefit of the 1886 Mdewakantons and their descendants – is no.

III

The second certified question asks whether the 1980 Act terminated any trust created by the Appropriations Acts.

Congress's purpose in the 1980 statute was to alter the ownership status of the 1886 lands. What Congress plainly sought to achieve was to have the United States' interest in the lands converted into a trust for the three communities, whereby the United

States would hold legal title to the lands and each of the three communities would hold equitable title to the portions of the 1886 lands allocated to it. The operative language of the statute makes that purpose plain. It states, in pertinent part, as follows:

> That all right, title, and interest of the United States in [the 1886 lands] which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians [under the Appropriations Acts] are hereby declared to hereafter be held by the United States –
>
> (1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;
>
> (2) with respect to the some 572.5 acres of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota; and
>
> (3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust for the Prairie Island Indian Community of Minnesota.
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> . . . .
>
> . . . The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

94 Stat. at 3262.

The trial court construed that statute as creating a trust in favor of the three communities and in turn requiring the three communities to hold the 1886 lands in trust for the 1886 Mdewakantons. The court further held that as of the time of the 1980 Act, the United States held only legal title to the 1886 lands, and the descendants of the 1886 Mdewakantons held equitable title. Therefore, the court concluded, when the 1980 Act transferred all the United States' right, title, and interest in the land, it transferred only legal title to the lands, and the descendants of the 1886 Mdewakantons continued to hold equitable title. *Wolfchild I,* 62 Fed.Cl. at 543. The plaintiffs agree with that construction of the statute and contend that they all share beneficial ownership of the 1980 lands in the form of an undivided equitable interest in the disputed property.

The main problem with the plaintiffs' theory is that if their interpretation of the 1980 Act is correct, it is hard to understand what the 1980 Act accomplished. At the time the 1980 Act was enacted, the United States already held legal title to the 1886 lands. According to the plaintiffs, they enjoyed beneficial ownership of the 1886 lands both before and after the 1980 Act, so the Act did not affect their interests in the 1886 lands. Moreover, in the plaintiffs' view the Act did not give the three Mdewakanton communities equitable title to those lands or, so far as we can discern, any other interest in the property. The plaintiffs suggest that although the Act declared that the United States would

henceforth hold the 1886 lands in trust for the three communities, the intended effect of the Act was to require the communities in turn to hold that property in trust for the descendants of the 1886 Mdewakantons, who would therefore hold equitable title to those lands. As a result, the communities, although explicitly designated in the Act as trust beneficiaries, would instead become trustees with regard to the property, even though they held no legal or equitable interest in that property.

The plaintiffs argue that their construction would not render the 1980 Act meaningless, because the 1980 Act rendered the lands subject to the communities' political jurisdiction and eligible for encumbrance with long-term leases. But the plaintiffs do not explain what practical impact it would have on the communities for the lands to be "subject to the communities' political jurisdiction" if legal title remained in the United States and equitable title remained in the 1886 Mdewakanton descendants. Moreover, as was explained in contemporaneous Interior Department documents, the availability of the lands for leasing under pertinent regulations depended on the lands being tribally owned. The Interior Department regarded the current status of the lands as barring such leasing. The plaintiffs have not shown how, under their construction of the 1980 Act, the pre-1980 "unusual ownership status of the land," which interfered with issuing long-term leases, *see* S.Rep. No. 96-1047, at 6; H.R.Rep. No. 96-1409, at

6, would change in a fundamental way that would affect the eligibility of the land for leasing.[11]

The trial court recognized the awkwardness of the plaintiffs' construction of the 1980 Act, noting that under that construction the Act appeared "to create a trust on a trust." The court, however, concluded that the task of sorting out the precise interests of the parties following the 1980 Act "must be remitted to exploration in future proceedings." *Wolfchild I,* 62 Fed.Cl. at 544 n. 13.[12] The problem arose, according to the court, because the 1980 Act "is so poorly drafted that it is difficult to make sense of its provisions." *Id.* To the contrary, we conclude that the Act is difficult to understand only if it is viewed in the way the plaintiffs view it – as intended to

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[11] The plaintiffs suggest in passing that the status of the lands as "reservation" lands under the 1980 Act could "possibly" qualify those lands for leasing under the pertinent regulations. Yet it is the 1980 Act's reference to the conversion of the lands to "reservation" status that is most problematic for the plaintiffs' theory that the 1980 Act left their interests in the 1886 lands unaffected.

[12] In a later opinion, the court characterized the 1980 Act as having "created an overlay on the earlier trust" and that the government's post-1980 transfer of lands, monies, and other property to the communities made those communities "agents of the federal government in administering the trust on behalf of the trust beneficiaries." *Wolfchild v. United States,* 72 Fed.Cl. 511, 528-29 (2006). While Congress could certainly devise such an arrangement, we see nothing in the 1980 Act that establishes it, and assigning the communities the role of fiduciary agents is at odds with the statutory language that designates them as trust beneficiaries.

preserve equitable title to the disputed lands in the 1886 Mdewakanton descendants. If the Act is viewed as creating a trust in which legal title is held by the United States and beneficial title is held by the three communities, the wording of the Act achieves that purpose clearly and simply.

Nothing in the very straightforward language of the statute (and nothing in any of the legislative history) suggests that Congress intended to create a "trust on a trust" or any other elaborate structure in which the three communities would assume some undefined role between the continuing holder of legal title (the United States) and what the plaintiffs see as the continuing holders of equitable title (the 1886 Mdewakanton descendants). Under the plaintiffs' construction of the statute, the three communities would be designated as trust beneficiaries, but would hold no beneficial interest as a result of the trust. Instead, according to the trial court, the three communities "have assumed a fiduciary role as agents of the United States . . . in administering the trust on behalf of the trust beneficiaries." *Wolfchild v. United States,* 72 Fed.Cl. 511, 529 (2006). Yet the statutory characterization of the land as being held "for the benefit of" the three communities is not consistent with the rights and obligations of the communities under the plaintiffs' theory or the court's construction. In addition, under the plaintiffs' theory the expressed purposes of the 1980 Act would not be served, as the problem of the two classes of property and the two classes of Mdewakantons would persist, even though

eliminating those two classes of property and holders of property rights was a principal objective of the statute.

A further problem with the trial court's interpretation of the 1980 Act is that it is in tension with the provision in the Act that declares the transferred 1886 lands to be "part of the reservations of the respective Indian communities." 94 Stat. at 3262. As previously noted, the term "reservation" typically denotes property for which legal title is in the United States and equitable title is in the tribe. Lands that the Secretary adds to existing reservations are designated by statute as reserved "for the exclusive use of Indians entitled to enrollment or by tribal membership to residence at such reservations." 25 U.S.C. § 467. In light of that statutory provision dedicating new reservation lands to the use of tribal members only, it would be anomalous to construe the 1980 Act, which made the 1886 lands part of the three communities' reservations, to mean that those lands would be held in trust for the class of 1886 Mdewakanton descendants, many of whom were not enrolled or eligible for enrollment in any of the three communities.

For the foregoing reasons, even if we construed the Appropriations Acts as creating a trust relationship by implication or by operation of law, we would hold that the 1980 Act terminated that trust. If the Appropriations Acts created a trust for a class consisting of the 1886 Mdewakantons and their descendants, the relationship between the government

and the beneficiary class would be akin to the relationship between the government and individual members of a tribe with respect to reservation lands. And as to that relationship, the Supreme Court has held that Congress can freely alter the terms of any provision relating to the distribution of Indian lands at any point prior to the time those interests are allotted or individuals otherwise obtain vested rights in the property. *See United States v. Jim,* 409 U.S. 80, 82, 93 S.Ct. 261, 34 L.Ed.2d 282 (1972) (Congress may alter the distribution scheme of an earlier statute that created a trust relationship with a tribe); *Sizemore v. Brady,* 235 U.S. 441, 449, 35 S.Ct. 135, 59 L.Ed. 308 (1914); *Gritts v. Fisher,* 224 U.S. 640, 648, 32 S.Ct. 580, 56 L.Ed. 928 (1912). Congress's decision to give the three Mdewakanton communities beneficial ownership rights in the 1886 lands, rather than continuing to hold those lands for the use and benefit of the 1886 Mdewakanton descendants, would therefore be within Congress's power over such property, even if that action were taken over the objection of the original beneficiaries. Because a change in the identity of the beneficiaries does not constitute a taking of property from individuals who had an expectation of benefit but no vested rights in the property, there is no force to the plaintiffs' argument that if Congress had intended to confer beneficial title to the 1886 lands on the three communities, it would have provided compensation to the 1886 Mdewakanton descendants under the takings clause of the Fifth Amendment.

The trial court made two points in support of its conclusion that the 1980 Act did not terminate the trust created by the Appropriations Acts, but we do not find either of those points persuasive.

First, the court noted that the 1980 Act did not contain express language terminating a trust. Because the Appropriations Acts contained no express language creating a trust, however, it is not surprising that the 1980 Act contained no express language of termination. Even if the Appropriations Acts are regarded as having imposed sufficiently specific duties on the Secretary of the Interior to give rise to a trust relationship with the 1886 Mdewakantons, a trust was, at most, created only by operation of law. Under those circumstances, Congress's failure to include express language of trust termination cannot be regarded as indicative of an intention not to alter the previous legal relationship among the parties.[13]

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[13] A similar point applies to the trial court's conclusion that construing the 1980 Act to transfer the 1886 lands in trust to the three communities constitutes an implied repeal of the Appropriations Acts, and that the government's construction of the 1980 Act is therefore suspect in light of the doctrine that implied repeals are disfavored. *See Wolfchild I*, 62 Fed.Cl. at 543-44. We do not agree that the 1980 Act, as construed by the government, would effect a repeal of the Appropriations Acts, implied or otherwise. The 1980 Act simply provides for the long-term disposition of the property purchased pursuant to the Appropriations Acts, an issue left unresolved by Congress both in those Acts and during the ensuing 90 years.

Second, the court found significance in the savings clause of the 1980 Act, which stated that nothing in the Act shall "alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment." Those provisions, according to the court, indicated that the 1980 Act did not terminate the pre-existing trust. In fact, however, those provisions merely demonstrate that Congress did not intend for the new statute to undermine any current interests represented by existing assignments or contracts. *See Brewer v. Acting Deputy Assistant Sec'y – Indian Affairs,* 10 I.B.I.A. 110, 120 (1982) (acknowledging that assignees have a property interest protected by the savings clause).

Thus, assignees under existing Indian Land Certificates were allowed to remain in occupancy, but no further certificates were to be issued to successor assignees after the death of the assignees or other termination of the current assignments. Likewise, the 1980 Act did not terminate any rights associated with current leases on portions of the 1886 lands. But that does not demonstrate that the 1980 Act made no change that affected the interests of those who might have expected land assignments or other benefits in the future.

In fact, the presence of the savings clause in the 1980 Act provides affirmative evidence in favor of the government's interpretation of that statute. If the 1980 Act had no effect on the equitable rights of the 1886 Mdewakantons in the 1886 lands, as the

plaintiffs contend, there would have been no need for a savings clause to preserve the interests of the current assignment holders from the adverse effects of the 1980 legislation. The fact that the savings clause was regarded as necessary to protect the current assignees is a clear indication that the drafters viewed the Act as otherwise terminating any equitable interests of the 1886 Mdewakantons in those lands.

Significantly, the Department of the Interior, which had drafted the 1980 Act, made clear shortly after the date of enactment that it construed the Act as creating a trust in favor of the three communities and not granting or preserving beneficial ownership rights in the 1886 Mdewakanton descendants. A letter sent to the Lower Sioux Community Council by the Interior Department's Area Director within days of the enactment of the 1980 Act expressed the Department's position that the Act "gives jurisdiction to each Community Council on the same basis as other tribally-owned land," and that, as a result, "the income derived from these lands in the future will be utilized as other income from tribal land."

Similarly, in administrative proceedings following the 1980 Act, the Department made clear that, with the exception of those persons affected by the savings clause, it interpreted the 1980 Act as terminating any interest of the 1886 Mdewakanton descendants in the 1886 lands and instead created a trust relationship with the three communities. *See Gitchel v. Minneapolis Area Dir., Bureau of Indian*

Affairs, 28 I.B.I.A. 46, 48 (1995) ("[T]here is simply no question as to the intent of Congress in 1980 to convey the beneficial title to these lands to the Communit[ies]."); *Brewer,* 10 I.B.I.A. at 118-19 ("[t]he Department's position concerning these lands has . . . consistently been that they were not made available by Congress for allotment, were never allotted, and were therefore available in 1980 to become tribal lands held by the Department in trust. Congress approved this position when it adopted the 1980 Act."); *In re Estate of Gofas,* Indian Probate No. TC 389S-81, at 34 (Interior Office of Hearings and Appeals Oct. 29, 1990) (1980 Act declared title to Scott County lands to be vested in the United States "in trust for the Shakopee Mdewakanton Sioux community").

The view of the agency as to the proper construction of the statute is particularly pertinent in a case such as this one, in which the agency drafted the legislation in question, was deeply involved in its enactment, and attached the pertinent construction to the statute roughly contemporaneously with its passage. *See Lindahl v. Office of Pers. Mgmt.,* 470 U.S. 768, 788, 105 S.Ct. 1620, 84 L.Ed.2d 674 (1985); *Sec. & Exch. Comm'n v. Sloan,* 436 U.S. 103, 120, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978); *Zuber v. Allen,* 396 U.S. 168, 192, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969). The proper construction of the 1980 Act is thus confirmed by the clear interpretation of that statute

within the agency that proposed, drafted, and supported the legislation.[14]

For these reasons, we conclude that the answer to the second of the certified questions in this case –

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[14] The parties devote some attention to the question whether it was lawful for the Interior Department, following the 1980 Act, to transfer to the three communities approximately $60,000 in funds that had been collected as proceeds from the sale, use, or leasing of certain of the 1886 lands, given that the 1980 Act was silent as to the disposition of those funds. *See Wolfchild I*, 62 Fed.Cl. at 549-50. That issue does not affect our analysis of the two certified questions, however, and we leave that issue to be addressed, to the extent necessary, in further proceedings before the trial court.

The parties also engage in a debate over whether the trial court ruled that Congress's enactment of the 1980 Act itself constituted a breach of trust. The suggestion that the court so ruled is based on a passing statement in a later opinion in which the court remarked that the "United States breached the trust engendered by the Appropriations Acts through the passage of the 1980 Act and other actions taken thereafter." *Wolfchild v. United States*, 78 Fed.Cl. 472, 475 (2007). The plaintiffs contend that the court's remark should not be understood as suggesting that the legislation itself constituted a breach of trust, but "is a reference to the passing of time prior to the 1980 Act and not to 'the passage' of the 1980 Act." Whatever may be the proper reading of that statement by the trial court, it was not part of the court's main opinion on this issue, and in any event it is clear that an Act of Congress cannot constitute a breach of trust for which relief can be obtained from the Court of Federal Claims. *See Menominee Tribe of Indians v. United States*, 221 Ct.Cl. 506, 607 F.2d 1335, 1339, 1344-45 (1979).

whether Congress, through the enactment of the 1980 Act, terminated any trust created by the Appropriations Acts – is yes.

In light of our disposition of the two certified questions, we reverse and remand for further proceedings in the trial court.

Each party shall bear its own costs for this appeal.

REVERSED and REMANDED.

78 Fed.Cl. 472

United States Court of Federal Claims.
Sheldon Peters WOLFCHILD, et al., Plaintiffs,
v.
UNITED STATES, Defendant.
Nos. 03-2684L, 01-568L.

Sept. 26, 2007.

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OPINION AND ORDER

LETTOW, Judge.

This Indian trust case has been brought by approximately 20,750 individuals claiming descent from persons who were members of the Mdewakanton band of Sioux Indians and who assisted white settlers in Minnesota during the 1862 Sioux uprising ("the loyal Mdewakanton"). *See Wolfchild v. United States*, 62 Fed.Cl. 521, 526-29 (2004) ("*Wolfchild I*") (describing the 1862 Sioux uprising, the role of the loyal Mdewakanton, and their severance of tribal relations after the uprising).[1] Promptly after this suit was filed in November 2003, the court addressed the nature and viability of the Indian trust claims, in due course granting a motion by plaintiffs for a partial summary judgment that (1) a trust, which included land, improvements to land, and monies as the corpus, was created in connection with, and as a result of, provisions in appropriation acts for the Department of the Interior in 1888, 1889, and 1890 ("Appropriation Acts")[2] that provided money to be expended under

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[1] The lineal descendants of the loyal Mdewakanton constitute an "identifiable group of American Indians" within the meaning of the Indian Tucker Act, 28 U.S.C. § 1505, and accordingly this is a collective action under that Act.

[2] The three Appropriation Acts are the Act of June 29, 1888, ch. 503, 25 Stat. 217, 228-29; the Act of Mar. 2, 1889, ch. 412, 25

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specific directions for the benefit of the loyal Mdewakanton and their descendants,[3] (2) such trust

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Stat. 980, 992-93; and the Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349.

[3] The initial trust beneficiaries were defined in the Appropriation Acts as "Indians in Minnesota, belonging to the Medwakanton [sic] band of Sioux Indians, who have resided in said State since [May 20, 1886] . . . and severed their tribal relations." Act of June 29, 1888, 25 Stat. at 228; *accord* Act of Mar. 2, 1889, 25 Stat. at 992; Act of Aug. 19, 1890, 26 Stat. at 349. These Indians had been loyal to the United States during the Sioux uprising, which began in Minnesota in August 1862 and claimed the lives of more than 500 white settlers and numerous Indians. *See Wolfchild I,* 62 Fed.Cl. at 526. By aiding the white settlers, many of the loyal Indians lost their homes and property, and Congress concluded that their lives would be in danger were they to return to their tribes. *Id.* (quoting *Cong. Globe,* 38th Cong., 1st Sess. 3516 (1864)).

> The explicit statutory definitional reference to Indians "who have resided in said State since . . . [May 20, 1886]" was to a census prepared by U.S. Special Agent Walter McLeod, who determined on behalf of the Commissioner of Indian Affairs which Mdewakanton Indians (1) were loyal to the United States during the 1862 uprising, (2) had renounced their tribal relations, and (3) had remained in Minnesota. *See Wolfchild I,* 62 Fed.Cl. at 528.
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> Under the 1889 and 1890 Appropriations Acts, the beneficiaries included both the loyal Mdewakanton and their families. Act of Mar. 2, 1889, 25 Stat. at 992 (monies to be appropriated for "these Indians or family thereof"); Act of Aug. 19, 1890, 26 Stat. at 349 (monies to be appropriated for "these Indians or families thereof"). The Appropriation Acts were intended as a substantial addendum to an act adopted in 1863 for the benefit of "individual[s] of the before-named bands [Sisseton, Wahpaton, Mdewakanton, and Wahpakoota]

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was neither extinguished nor terminated by the Act of December 19, 1980, Pub.L. No. 96-557, 94 Stat. 3262 (the "1980 Act"), which converted interests of the United States in the property at issue to a holding in trust for three Indian communities located in Minnesota,[4] and (3) the United States breached the trust engendered by the Appropriation Acts through the passage of the 1980 Act and other actions taken thereafter. *See Wolfchild I,* 62 Fed.Cl. at 555.[5]

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who exerted [them]sel[ves] in rescuing the whites from the late massacre [by] said Indians." Act of Feb. 16, 1863, § 9, 12 Stat. 652, 654. *See Wolfchild I,* 62 Fed.Cl. at 526. The 1863 Act specified that the land addressed by that Act "shall be an inheritance to said Indians and their heirs forever." 12 Stat. at 654. This prior statutory text illuminates the reference to "families" in the later Appropriation Acts.

[4] The three Indian communities are the Lower Sioux Indian Community, the Shakopee Mdewakanton Sioux (Dakota) Community, and the Prairie Island Indian Community in Minnesota. Pub.L. No. 96-557, 94 Stat. at 3262.

[5] Plaintiffs also put forward contractual claims that were dismissed because of the six-year statute of limitations applicable to claims brought under the Tucker Act, but their trust claims had been preserved by the Indian Trust Accounting Statute. *Wolfchild I,* 62 Fed.Cl. at 547-49; *see* Department of the Interior and Related Agencies Appropriations Act, 2004, Pub.L. No. 108-108, 117 Stat. 1241, 1263 (2003). The Indian Trust Accounting Statute, with minor variations, has been enacted for fiscal years 1991 to 2006 as part of the annual appropriations statute for the Department of the Interior. It provides that the statute of limitations for claims alleging mismanagement or loss of Indian trust funds shall not begin to run until the beneficiaries have been given an accounting. *See* Pub.L. No. 108-108, 117 Stat. at 1263 (fiscal year 2004 version);

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Thereafter, over a period of two and one-half years, the court considered and resolved numerous party-related issues that arose in this collective action. *See Wolfchild v. United States,* 68 Fed.Cl. 779 (2005) (*"Wolfchild II"*); *Wolfchild v. United States,* 72 Fed.Cl. 511 (2006) (*"Wolfchild III"*); *Wolfchild v. United States,* 77 Fed.Cl. 22 (2007) (*"Wolfchild IV"*). Among other things, the court granted plaintiffs' request for authorization to inform prospective plaintiffs of the pendency of this action, *Wolfchild II,* 68 Fed.Cl. at 785-87, 801, requiring plaintiffs to send personal notice to all lineal descendants of the loyal Mdewakanton whose names and addresses were known and who had not already joined in the action, and to publish notice in newspapers and periodicals that had wide circulation in Minnesota or among Native Americans. *Id.* at 801, 804-805; *Wolfchild III,* 72 Fed.Cl. at 516.[6] Subsequently, plaintiffs were granted leave to file a Third Amended Complaint to add thousands of additional plaintiffs, and thousands of other individuals, making up 41 separate groups,

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accord Department of the Interior, Environment, and Related Agencies Appropriation Act, 2006, Pub.L. No. 109-54, 119 Stat. 499, 519 (2005) (fiscal year 2006 version); *see also Shoshone Indian Tribe of Wind River Reservation v. United States,* 364 F.3d 1339, 1347 (Fed.Cir.2004); *Wolfchild I,* 62 Fed.Cl. at 534-535 & n. 10.

[6] To aid in providing notice to potentially interested persons, and pursuant to the "Call Statute," 28 U.S.C. § 2507, the court also required the government to provide a listing of those lineal descendants known to the government. *Wolfchild II,* 68 Fed.Cl. at 797-98.

were granted intervention as plaintiffs. *Wolfchild III,* 72 Fed.Cl. at 514, 539-40; *Wolfchild IV,* 77 Fed.Cl. at 31-36. The court also granted a motion by the Lower Sioux Indian Community ("Lower Sioux") for leave to intervene as a plaintiff. *Wolfchild III,* 72 Fed.Cl. at 514, 540. Third-party summonses were issued to the Prairie Island and Shakopee Indian Communities to bring those Communities into the case as defendants, but those summonses were quashed because the redressability criterion for standing under Article III of the Constitution was not satisfied as to those communities. *Wolfchild IV,* 77 Fed.Cl. at 27-31.

At this juncture, both the court and most of the parties are ready to proceed with discovery and other steps to prepare the case for resolution.[7] The parties

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[7] In *Wolfchild IV,* the court identified the following issues as requiring development prior to resolution of the case:

> (1) delineating the trust created by the 1888, 1889, and 1890 Appropriation Acts, (2) accounting for the [handling of the] trust corpus by the Department of the Interior and its agents after enactment of the 1980 Act, (3) addressing the current legal status of the 1886 lands, (4) explicating and applying the criteria for determining whether a plaintiff or intervening plaintiff qualifies as a lineal descendant of a loyal Mdewakanton and thus a beneficiary of the trust, and (5) determining the monetary relief to which individual claimants might be entitled.

77 Fed.Cl. at 36. Notwithstanding this recitation of issues, the litigation now might be distilled down to three fundamental questions: "what property is involved," "what's happened to that property," and

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have proposed several variants of a plan and schedule for these steps. However, the government has interposed a motion to certify the court's prior decisions, specifically those rendered in October 2004 (*Wolfchild I*), December 2005 (*Wolfchild II*), and August 2006 (*Wolfchild III*), for interlocutory appeal under 28 U.S.C. § 1292(d)(2), and to stay discovery and other preparatory proceedings in the interim. All of the plaintiffs and intervening plaintiffs oppose this motion on procedural (*i.e.*, untimeliness) and substantive grounds. By this decision, the court addresses each of the parties' pending motions and requests.

ANALYSIS

A. Pre-Trial Plan and Schedule

Looking forward to efforts by the parties to prepare this case for resolution on the merits, in *Wolfchild IV* the court asked counsel to undertake three steps: (1) that counsel for the various groups of intervening plaintiffs select a proposed coordinating counsel and an alternate for each of the two different categories of individual intervening plaintiffs, namely, those who claim descendancy from persons on the 1886 and 1889 censuses prepared by special agents of the Department of the Interior and those whose claim has another source, (2) that counsel for the parties confer and submit a plan and schedule for

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"who's a lineal descendant." Hr'g Tr. 76:25 to 77:3 (Aug. 6, 2007).

pre-trial proceedings, and (3) that counsel for plaintiffs and for each group of intervening plaintiffs submit compact disks listing the individual claimants represented by them, including, separately to the court and counsel for defendant only, lists of those claimants who have been granted leave to participate anonymously in this litigation. 77 Fed.Cl. at 36. Those steps have been accomplished.

The court acknowledges and accepts the selection by counsel for intervening plaintiffs of Sam Killinger as coordinating counsel for Group A, the intervening plaintiffs who claim descendancy from the 1886 and 1889 censuses, with Garrett Horn as the alternate and Kelly Stricherz as assistant for Group A, and Gary Montana as coordinating counsel for Group B, those intervening plaintiffs who base their claim on other sources, with Creighton Thurman as the alternate and Robin Zephier as assistant. These counsel have accepted responsibility for drawing together the positions of the groups of intervening plaintiffs on the issues that may arise and for presenting the positions of their groups to the court in a single filing, if feasible. Hr'g Tr. 29:7 to 31:8, 34:11-24 (Aug. 6, 2007).[8]

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[8] Most of the lineal descendants who have appeared and submitted a claim as plaintiff or intervening plaintiff live in Minnesota, Nebraska, South Dakota, Iowa, and Montana, Hr'g Tr. 45:22-23, and counsel generally are located in the upper Midwest and Plains States.

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The plan and schedule proposed by plaintiffs and intervening plaintiffs has six basic elements: (1) initial disclosures under Rule 26(a) of the Rules of the Court of Federal Claims ("RCFC"), (2) discovery particularly to identify trust assets and the handling of those assets, to include U.S. Treasury accounts 147436 and 147936 for the Bureau of Indian Affairs, as well as the 1886 lands, (3) discovery regarding revenues or income produced or generated by or from the 1886 lands by the Communities, and from monies transferred to the Communities by the Department of the Interior, and payments and distributions made by the Communities of such revenues or income, (4) a bar on the deposition of any individual plaintiff or intervening plaintiff, absent court approval, (5) a schedule for submission and briefing of summary judgment motions, and (6) a time for commencement of trial. Joint Status Report (July 20, 2007) ("JSR") at 3-4, 31-47, 48-64 and following sheet. Defendant "objects to proceeding with initial disclosures at this stage," or taking any of the other further preparatory elements identified by plaintiffs and intervening plaintiffs, pending final action on its motion for certification for interlocutory appeal. JSR at 28.

The government concedes that fundamental issues remain unresolved and, indeed, significantly unexplored. Among other things, "[d]efendant notes

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All citations to the "Hr'g Tr." in this decision are to the transcript of the hearing held on August 6, 2007.

particularly that the question of the scope of the alleged trust, including what types of assets lie within that 'trust,' has yet to be determined in this litigation." JSR at 29. Notably, the court's initial obligations in these cases were to determine whether plaintiffs had stated a viable claim over which the court had jurisdiction, *see Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 88-89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), and then to oversee joinder of additional parties in an orderly manner in this collective action. *See Hoffmann-La Roche, Inc. v. Sperling,* 493 U.S. 165, 170-71, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). The court has fulfilled those responsibilities, and in the process has granted partial summary judgment to plaintiffs and added thousands of plaintiffs and intervening plaintiffs to the litigation. Now, when the time for fleshing out the fundamental issues is at hand, it would be notably unfair and prejudicial to the plaintiffs to halt preparatory steps to that end. Accordingly, acting pursuant to RCFC 16(b) and RCFC Appendix A, ¶¶ 7-8, the court adopts a modified schedule for further proceedings, as set out at the conclusion of this opinion.

B. Residual Party-Related Issues

Although *Wolfchild III* and *Wolfchild IV* addressed questions about participation of numerous individuals and the Communities in this litigation, the parties have raised residual party-related issues. Managing this collective action with a very large

number of individual claimants separated into so many groups has proved to be a daunting task. *See Wolfchild IV,* 77 Fed.Cl. at 34 ("This action threatens to become so cumbersome and laden with claimants that bringing it to a final conclusion within a reasonable time is put in jeopardy."). In April 2007, after first imposing a twice-extended deadline for claimants to intervene as plaintiffs, and then allowing yet a further set of motions to intervene and to amend previously granted interventions, the court warned that "any future requests by individuals to participate in the *Wolfchild* case as claimants will be deemed to be untimely and to impair the manageability of this suit." *Id.* at 35-36.[9] Noting that the statute of limitations had not yet begun to run because of the Indian Trust Accounting Statute, the court advised that "[f]urther individuals who wish to pursue claims of breach of trust arising out of the 1888, 1889, and 1890 Appropriations Acts must file separate actions to vindicate their positions." *Id.* at 36. Now, at this later stage of the case the court has been presented with numerous requests to correct names, including those of newly married persons as well as others, and to add children newborn to persons already named as plaintiffs or intervening plaintiffs. Twenty-one such motions are pending, filed by plaintiffs and by twenty groups of intervening

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[9] The court acted in accord with its authority in a collective action to "limit [ ] time for . . . the joinder of additional parties." *Hoffmann-La Roche,* 493 U.S. at 173, 110 S.Ct. 482.

plaintiffs. At a hearing held on August 6, 2007, the court required that any such motion be filed on or before August 20, 2007. Each of the pending motions was filed by that date.

The government has not objected to these motions insofar as they seek to correct names or to add newborn children, *see* Def.'s Resp. to Garreau (Hall) Mot. for Leave to File Am. Compl. to Correct Names [582] at 1; Def.'s Omnibus Mem. of Points and Authorities [596] ("Def.'s Omnibus Mem.") at 2-3, but it has objected to adding other additional plaintiffs. Def.'s Omnibus Mem. at 4-5. For purposes of amending the complaint and intervening complaints in this litigation, the government would define "newborns" as those persons born between July 12, 2006 and August 20, 2007. *Id.* at 2. The government recites that the common definition of "newborn" is a "neonate" or a "newborn infant, especially less than four weeks old." *Id.* at 3 (quoting *The American Heritage Dictionary of the English Language* 1178 (4th ed.2000)).[10] Here, however, the government puts forward a more expansive definition of newborn to account for the fact that the court previously set July

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[10] The definition actually quoted by defendant is that for "neonate," not "newborn." *Compare The American Heritage Dictionary of the English Language* 1178 ("[N]eonate" means "[a] newborn infant, especially one less than four weeks old."), *with id.* at 1184 ("[N]ewborn" means "[v]ery recently born.") "Neonate" thus implies that a baby has been born within a more specifically defined recent time than "newborn." For purposes of this case, the difference is not significant.

12, 2006, as the extended deadline for intervention. *Id.* at 2.

The court conceptually accepts the government's suggested expansive definition of newborn for purposes of the pending motions. However, the government's proposed delineating dates for the newborns have to be modified. It would be unrealistic to expect that child born shortly before the prior deadline for intervention could reasonably have been included in a complaint for intervention. Accordingly, the court will consider newborns for this specific purpose to be persons born between January 1, 2006 and August 20, 2007.

Four groups proposed to include newborn children who are *en ventre sa mere*. *See* the motions to amend filed by the Whipple group [538], Lafferty group [539], Lowe group [540], and Mozak group [547]. The government acknowledges that the court previously allowed unborn children to be included in a complaint in intervention, at least conditionally. Def.'s Omnibus Mem. at 3-4 (referring to *Wolfchild IV*, 77 Fed.Cl. at 35 n. 22). The court's prior action was based upon the common law rule that a child *en ventre sa mere* is deemed to be *in esse* for purposes of inheritance or taking a remainder or other estate of interest for its own benefit. *Wolfchild IV*, 77 Fed.Cl. at 35 n. 22. The government does not challenge the common law rule, but it does resist the conclusion that an unborn child possesses a cause of action cognizable in federal court for damages. Def.'s Omnibus Mem. at 4. Nonetheless, the government

does not oppose the addition of those putative plaintiffs in this litigation, so long as they are properly identified. *Id.* The court consequently allows unborn children to be added to the listing of individual plaintiffs for the four groups of intervenors which sought to include them.

Plaintiffs and four groups have sought to amend their complaints to add persons who were not newborns.[11] The groups do not offer an explanation or justification for these additions, other than the representation that the new claimants were "inadvertently not included" earlier, Aff. Re Am. Compl. [562], and that no prejudice to any party would result from the addition. Intervenors' Reply [617] at 2. *See also* Pl.'s and Intervenors Supplement to Joint Status Report and Response. . . . Addressing the United States' Opposition to Amend Complaints [623] at 5 (contending that no prejudice would arise from adding claimants at this stage of the case, and requesting that the court "permit an additional filing period of three additional weeks for amended complaints adding additional [p]laintiffs and [i]ntervenors."). Also, in the same vein, one new group, the Werner

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[11] Plaintiffs [567], and the Vadnais [558], Julia DuMarce [545], Rocque [524], and Marvel DuMarce [560] groups of intervening plaintiffs have sought to add a person or persons not previously named in any prior complaint or complaint in intervention.

group, has sought leave to intervene.[12] In support of the Werner group's motion, the applicants for intervention aver that they are descendants of persons listed on the 1886 census of loyal Mdewakanton prepared by Special Agent Walter McLeod for the Department of the Interior. Applicant's Mem. [550] at 1. They explain that the timing of their application was governed by their need to produce "genealogical information to establish their connection as rightful lineal descendants." *Id.* at 2. The government opposes these additions, noting that the court in *Wolfchild IV* had specified that further requests by individuals to participate as claimants would be deemed to be untimely. Def.'s Omnibus Mem. at 4-5 (drawing upon *Wolfchild IV,* 77 Fed.Cl. at 35-36); Def.'s Resp. In Opposition to Werner Group's Mem. [601] at 2.

The court concurs with the government's opposition to these efforts to add plaintiffs other than newborns, notwithstanding the fact that under RCFC 15(a) amendments are generally favored. As the rule specifies, "leave [to amend a pleading] shall be freely given when justice so requires." RCFC 15(a); *see also Foman v. Davis.* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). However, a motion to amend may be denied because of, among other things, undue delay or prejudice to existing parties. *Foman,* 371 U.S. at 182, 83 S.Ct. 227; *Te-Moak Bands of W.*

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[12] The Werner group's motion to intervene [550] would add a further set of intervening plaintiffs comprised of fourteen adults and seven minor children.

Shoshone Indians of Nev. v. United States, 948 F.2d 1258, 1260 (Fed.Cir.1991); *Christofferson v. United States*, 77 Fed.Cl. 361, 363-66 (2007); *Rockwell Automation, Inc. v. United States*, 70 Fed.Cl. 114, 121-23 (2006).[13] Here, the proposed additions come too late. As the court has observed, this action has already become extraordinarily "cumbersome and laden with claimants." *Wolfchild IV*, 77 Fed.Cl. at 34. A belated addition of other claimants would exacerbate the problems in managing the litigation and imperil the "just, speedy, and inexpensive determination" of the pending claims and defenses. RCFC 1. Particularly because the applicants who are not being allowed to join their claims in this litigation may file separate actions for relief without facing any bar from a statute of limitations, *see Wolfchild IV*, 77 Fed.Cl. at 36, the proposed addition of new intervening plaintiffs other than newborns will not be allowed.

Separately, the intervention of members of the Felix family poses a discrete pair of questions. First, those persons who are members of the extended but not immediate family of Francis Elaine Felix have moved for leave to be added to the Rocque group of intervening plaintiffs [524]. The extended Felix family had previously sought intervention in June 2006, and the court "allowed Ms. Felix to represent her family" only for purposes of the intervention

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[13] A motion for intervention under RCFC 24 must also be predicated upon a "timely application." RCFC 24(a), (b).

motion. *Wolfchild II,* 72 Fed.Cl. at 519 n. 9. The intervention motion was granted. *Id.* at 539. However, at that time the court noted that under RCFC 83.1(c)(8), Ms. Felix could represent herself and her "immediate" family on a *pro se* basis but could not represent the members of her extended family. *Id.* at 519 n. 9. As a result, the court required the members of her extended family to appear by counsel. *Id.* They did not do so in a timely fashion.

When the extended Felix family finally did act to protect their claims, they sought to "clarify" that they were and remained intervening plaintiffs even though they were not represented by counsel and had not filed a separate complaint in intervention. *See* Mot. to Clarify [506]. The government resisted that motion but advised that it would not oppose the addition of specifically identified members of the extended Felix family to an existing group of intervening plaintiffs, so long as no new answers were required. *See* Def.'s Resp. to Mot. to Clarify [513] at 2-3. Those conditions have been satisfied. Accordingly, the court grants the motion to amend the complaint in intervention of the Rocque group, to add individually identified members of the extended Felix family.

Second, the government objects to inclusion of Ms. Felix's grandchildren in her "immediate" family group, represented by her on a *pro se* basis. *See* Def.'s Resp. to Mot. to Clarify [513] at 3 n. 2; Hr'g Tr. 14:3-25. The government has done so on the basis that the term "immediate family" as used in RCFC 83.1(c)(8),

allowing representation on a *pro se* basis, encompasses a nuclear family of parents and children but not grandchildren. The government points to a prior decision to that effect by a judge of this court, *Chief War Eagle Family Ass'n v. United States*, No. 07-213L (Fed.Cl. July 18, 2007) (refusing to allow a *pro se* litigant to represent his grandparents). In interpreting the rule, the court in *Chief War Eagle* relied upon a definition of "immediate family" set out in *Black's Law Dictionary*, providing that a family so limited consisted of "[a] person's parents, spouse, children and siblings." *See Chief War Eagle*, slip op. at 2 (citing *Black's Law Dictionary* 638 (8th ed.2004)). However, this court modestly and respectfully disagrees with, and will not follow, the interpretation accorded RCFC 83.1(c)(8) in *Chief War Eagle*. The cited definition itself refers to three generations of persons, not two. Moreover, with longevity increasing, societally there are more and more instances where, because of employment of both spouses or single parents, grandparents are directly involved in the care of children, or instances where parents are caring simultaneously for their children and their parents. Thus, a three-generational span of direct familial interaction is again becoming typical. Accordingly, limiting "immediate" to two generations is unduly constraining. Ms. Felix may represent herself, her children, and her grandchildren.[14] The

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[14] Although Ms. Felix is appearing *pro se*, this litigation is proceeding as an "electronic case." Arrangements have been

(Continued on following page)

government has acquiesced in this result. Hr'g Tr. 14:13-18.

C. Certification For Interlocutory Appeal

The government has moved for certification for interlocutory appeal of three questions:

> (1) Whether a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriations Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus;
>
> (2) If the Appropriations Acts created such a trust, whether Congress terminated the trust with enactment of the 1980 Act; and
>
> (3) Whether the Lower Sioux, Prairie Island and Shakopee Indian Communities act as the agents of the United States as a result of the 1980 Act.

Def.'s Mot. to Certify Orders for Interlocutory Appeal ("Def.'s Mot. to Certify") [510] at 4-5. As the government would have it, the requirements of 28 U.S.C. § 1292(d)(2) for certification are satisfied as to these three questions. *Id.* at 4-20.

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made for her to send and receive electronic filings through her brother, who is an attorney.

Paragraph 1292(d)(2) of Title 28 provides in pertinent part that:

> [w]hen any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

In slightly restated form, for a certification to be adopted, this statutory provision requires the court to determine that (1) a controlling question of law is at issue, (2) a substantial ground for differences of opinion exists regarding that question, and (3) certification may advance the ultimate termination of the litigation. The statute thus "establishes a three-part test for certification that 'is virtually identical to the statutory standard of certification utilized by the United States district courts [under 28 U.S.C. § 1292(b)].'" *Marriott Intern. Resorts, L.P. v. United States*, 63 Fed.Cl. 144, 145 (2004) (quoting *American Mgmt. Sys., Inc. v. United States*, 57 Fed.Cl. 275, 276 (2003) (some internal quotation marks omitted)). Conceptually, these statutory provisions "reserve interlocutory review for 'exceptional' cases while

generally retaining for the federal courts a firm final judgment rule." *Caterpillar Inc. v. Lewis,* 519 U.S. 61, 74, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996) (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 475, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), in turn quoting *Fisons, Ltd. v. United States,* 458 F.2d 1241, 1248 (7th Cir.1972)).

Prior to applying the three-part statutory test, however, in this instance a threshold requirement for certification must be addressed. Any such request for certification must be timely. The governing statute sets no particular time limit on seeking certification of an interlocutory appeal. Nonetheless, the statute refers to an "immediate appeal," 28 U.S.C. § 1292(d)(2), and as Judge Posner explained in an opinion for the Court of Appeals for the Seventh Circuit in *Weir v. Propst,* 915 F.2d 283, 286 (7th Cir.1990), a timely motion for certification is required. Pointing to the circumstance that under Section 1292 a petition to the court of appeals has to be filed within ten days from the trial court's certification, Judge Posner commented that

> celerity was to be the touchstone of appealability under th[e] section. The reason is not hard to see. An interlocutory appeal normally interrupts the trial even though it does not suspend the trial court's jurisdiction, and the parties ought to know at the earliest possible opportunity whether such an interruption is going to occur.

Id.

As a general matter, this court has denied motions to certify where the motion was made more than several months after the decision sought to be certified for interlocutory appeal was entered. *See Scholl v. United States,* 68 Fed.Cl. 58, 60 (2005) (collecting precedents). Under the prior decisions applying Section 1292(d)(2), certification by amending a prior order was allowed up to three months after the order was issued when good cause was shown for the delay. *Id.* (citing *Marriott Int'l,* 63 Fed.Cl. at 145). When the delays were longer, certification was denied. *Id.* These precedents are in agreement with the more broadly cast commentary in *Weir* that

> [t]he ten-day limitation in section 1292(b) is not to be nullified by promiscuous grants of motions to amend [prior interlocutory rulings]. An amendment that will have the effect of extending the limitation is proper only if there is a reason for the delay, as there would be for example if developments since the interlocutory order had been entered demonstrated, as had been unclear earlier, that the order resolved a controlling question of law about which there was substantial ground for a difference of opinion.

915 F.2d at 287.

In this instance, the government does not offer good cause for its delay of more than two and one-half years in moving for amendment of *Wolfchild I* to

certify an appeal, and delays of nineteen and eleven months in moving to amend and certify *Wolfchild II* and *Wolfchild III*.In justification, the government indicates only that the court has largely completed "its rulings on . . . party-related motions," Def.'s Mot. to Certify at 2, and that "[t]his litigation is at a point where interlocutory appeal is appropriate." *Id.* The party-related motions, however, have had only a tangential bearing on the two key questions the government asks the court to certify, *i.e.*, whether the Appropriation Acts and the Department of the Interior's subsequent implementation of those Acts created a trust and whether the 1980 Act terminated that trust. In short, the government's motion to amend the interlocutory orders issued in October 2004 (*Wolfchild I*), December 2005 (*Wolfchild II*), and August 2006 (*Wolfchild III*) to certify those orders for interlocutory appeal is untimely and must be denied.

In supplemental briefing, the government changes its approach and argues that the court could rectify the timeliness problems that arise with its motion to amend the earlier orders by entering a fresh order adopting the earlier orders and, in effect, certifying the new order for interlocutory appeal. Def.'s Supp. Br. in Support of Its Mot. to Certify at 2. Conceptually, this approach has some merit. *Weir*, for example, recognized that a subsequently issued order might provide an occasion to seek an appeal. *See* 915 F.2d at 286 ("If the deadline is missed, the order is not appealable. The defendant must then wait until

another appealable order (normally, the final judgment) is entered, upon appeal of which he can challenge any interlocutory order that has not become moot."). *Compare Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1291-92 (11th Cir.2007) (rejecting under Fed.R.Civ.P. 23(f) a district court's effort to revive a class-certification decision for interlocutory appeal where the party seeking such appeal had failed to petition the court of appeals within ten days of the initial decision by the district court), *with Aparicio v. Swan Lake*, 643 F.2d 1109, 1112 (5th Cir.1981) (recognizing a district court's authority to vacate and reenter a certification order for purposes of 28 U.S.C. § 1292(b) where "the previous justification for a certification continues to exist"). Accordingly, the court will consider whether certification of *this* order might satisfy the criteria specified in Section 1292(d)(2).

The government argues that each of the three questions it seeks to raise on interlocutory appeal involves controlling questions of law. That proposition is arguably correct as to the first question posed, *i.e.*, whether the Appropriation Acts and the Department of Interior's implementation of them created a trust, is more confidently correct as to the second question, *i.e.*, whether the 1980 Act terminated the trust, and is assuredly *not* correct as to the third question respecting agency.

Taking the last question first, agency is ordinarily a mixed question of law and fact, *see Restatement (Third) Agency* § 1.02 cmt. a (2006)

("Whether a relationship is one of agency is a legal conclusion made after an assessment of the facts of the relationship and the application of the law of agency to those facts."); William A. Gregory, *The Law of Agency and Partnership* § 30.3, at 30 (2d ed. 2001) ("[A]gency and authority may be proved by any relevant facts."), and the court has had no occasion to make any findings of fact respecting whether an agency relationship exists or existed between the Department of the Interior and the Communities. Indeed, as the court has previously pointed out, the circumstances under which the 1886 lands and monies were transferred to the Communities has not been addressed in any detail. *See Wolfchild I,* 62 Fed.Cl. at 533 (discussing Letter from David Granum, Acting Area Director of the Bureau of Indian Affairs to Leon Columbus, Chairman, Community Council, Lower Sioux Community (Jan. 15, 1981), and Letter from Elmer T. Nitzschke, Field Solicitor, to Edwin Demery, Area Director (Feb. 6, 1981)). In issuing a summary judgment in *Wolfchild I* that a trust was formed and that the government had breached that trust, the court was satisfied beyond dispute *only* that real property and cash had been transferred from the Department to the Communities. *Wolfchild I,* 62 Fed.Cl. at 533. The agency question suggested by the government consequently cannot be certified for interlocutory appeal because it neither has been decided by this court nor is a question of law, let alone a controlling question.

The second question relating to the effect of the 1980 Act on the trust is a relatively straightforward question of law. The terms of the 1980 Act provide a basis for deciding that question. As the court observed in *Wolfchild I,* the 1980 Act contains no language of termination, and, indeed, it explicitly preserves aspects of the preexisting trust arrangement established by the Department. 62 Fed.Cl. at 543. The second question accordingly could be certified, if the other criteria in Section 1292(d)(2) were to be met. *See AD Global Fund, LLC v. United States,* 68 Fed.Cl. 663, 664-65 (2005).

The first question respecting trust creation is complicated by the fact that the terms of the 1888, 1889, and 1890 Appropriation Acts are crucial, along with the terms of, and experience under, the earlier 1863 Act, but the implementation of those Acts by the Department of the Interior also has a strong role. *See Wolfchild I,* 62 Fed.Cl. at 541-42. In connection with the decisions rendered in *Wolfchild I* and *Wolfchild II,* the parties collected and submitted for the court's consideration a large volume of documents related to implementation. In the circumstances, the question of whether a trust exists is a question of law with attendant factual underpinnings. *See Restatement (Third) Trusts,* § 2 cmt. f, at 21 (2003) ("In the strict, traditional sense, a trust involves three elements: (1) a trustee, who holds the trust property and is subject to duties to deal with it for the benefit of one or more others; (2) one or more beneficiaries, to whom and for whose benefit the trustee owes the duties with

respect to the trust property; and (3) trust property, which is held by the trustee for the beneficiaries."). Trusts created by statute may be governed by terms established in the statute or by general trust law. *See Restatement (Third) Trusts*, § 4, cmt. g, at 41 ("Some forms of trusts that are created by statute, especially public retirement systems or pension funds, and sometimes public land trusts, school land trusts, or trusts for benefit of native populations, are administered as express trusts, the terms of which are either set forth in the statute or are supplied by the default rules of general trust law."). The court was satisfied with the statutory and agency-implementing underpinnings and granted summary judgment in plaintiffs' favor on the issue. *Wolfchild I*, 62 Fed.Cl. at 540-42.[15] Accordingly, that question could be certified for interlocutory appeal.

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[15] The Appropriation Acts stated the grants for the benefit of the loyal Mdewankanton in terms that satisfied the common law elements for formation of a trust, *see supra*, at 475 n. 3, but did not explicitly use the word "trust." *See Wolfchild I*, 62 Fed.Cl. at 540-41 (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474 n. 3, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003)). The Department of the Interior used the word "trust" in its implementing documents issued thereafter. *Id.* at 529-30, 541-42 (quoting among other documents, the Indian Land Certificates issued to loyal Mdewakanton, the earliest of which in this record was dated June 1, 1905, as well as a Memorandum from the Acting Associate Solicitor for Indian Affairs to the Commissioner of Indian Affairs (Mar. 19, 1974), and a letter from the Field Solicitor to the Minneapolis Area Director of the Bureau of Indian Affairs (Nov. 8, 1978)).

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Both the first and second questions are "controlling" in the sense that the existence of a trust and the absence of a statutory termination of that trust "'materially affect' issues remaining to be decided in the trial court." *Marriott Int'l*, 63 Fed.Cl. at 145 (quoting *Pikes Peak Family Housing, LLC v. United States*, 40 Fed.Cl. 673, 686 (1998)); *see also Jade Trading, LLC v. United States*, 65 Fed.Cl. 443,

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Arguably, the Appropriation Acts themselves allowed, but did not require, that a trust be created. A mechanism different from a trust for aiding the loyal Mdewakanton might have satisfied the terms of the Appropriation Acts. However, the terms of the Appropriation Acts fit comfortably within a trust regime, and the Department of the Interior chose that mechanism for its implementation. As the Federal Circuit recently stated, "[w]here the government exercises actual control within its authority, neither Congress nor the agency needs to codify such actual control for a fiduciary trust relationship that is enforceable by money damages to arise." *Navajo Nation v. United States*, 501 F.3d 1327, ___, 2007 WL 2685641, at *14 (Fed.Cir.2007) (citing *White Mountain Apache*, 537 U.S. at 475, 123 S.Ct. 1126) (finding "a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee" where the government exercised its discretionary authority to supervise and occupy property); *United States v. Mitchell*, 463 U.S. 206, 225, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) ("[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise).").

447 (2005) (controlling question of law not presented by nonparty discovery issue).

The second criterion, whether "there is a substantial ground for difference of opinion," is arguable. This is a case of first impression. Strong indicia of the existence of a trust are present. The Appropriation Acts themselves reflect the common law elements of a trust. *Wolfchild I*, 62 Fed.Cl. at 540-41. From the early days of implementation forward, the Department of the Interior used the term "trust" in the Indian Land Certificates employed to convey possessory rights in parcels of the 1886 lands to lineal descendants. *See id.* at 529 (quoting Indian Land Certificate of Harry Bluestone (June 1, 1905)). And, subsequent statutes accorded the disposition of small parcels of the 1886 lands as deserving of treatment typically accompanying the partial termination of a trust. *See id.* at 529, 541 (discussing the Act of Feb. 25, 1901, 31 Stat. 805, 806, ("1901 Act"), provisions of which required the consent of beneficiaries for the disposition); *Wolfchild II*, 68 Fed.Cl. at 787-88 (addressing the 1901 Act along with principles set out in *Restatement (Third) of Trusts* § 65 (2003) (requirements for termination of a trust)), 789-90 (analyzing the Act of June 13, 1944, Pub.L. No. 78-335, 58 Stat. 274, which also provided for disposition of a parcel of the 1886 lands). Nonetheless, the conclusion that a trust was created involved the analysis and assessment of a number of statutes and many implementing steps taken over a span of 90 years. In these circumstances, the court

accords some weight to the government's desire to present its arguments to the court of appeals at this juncture and concludes that the second criterion has been sufficiently satisfied.

The third consideration is discretionary, turning on whether certification "*may* materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(d)(2) (emphasis added). Here, there is no doubt that the question of the existence, and continued existence, of a trust is at the heart of this litigation and that a ruling by the court of appeals on the trust issues would advance the resolution of the disputed matters.

As a result, the court concludes that certification for interlocutory appeal of the first two questions posed by the government is appropriate, as part of *this order, not* the prior orders issued in October 2004, December 2005, and August 2006. Good cause has not been shown to amend the prior orders, and they will remain undisturbed. As this opinion plainly indicates, the court continues to adhere to its prior rulings and to apply them in continuing proceedings in this litigation. The two questions thus certified relate to creation of a trust in connection with and as a consequence of the implementation of the Appropriation Acts by the Department of the Interior, and the continued existence of that trust after the 1980 Act. The question of agency proposed by the government is not certified.

Because the government's motion to certify orders is in many respects untimely, and because the parties have expended substantial resources in developing and addressing the party-related issues as a preamble to reaching this point, the court will not stay proceedings while the government petitions the court of appeals to grant interlocutory appeal of the two certified questions.

As Judge Posner pointed out in *Weir,* this court's jurisdiction is not displaced by a petition to grant an interlocutory appeal. *See* 915 F.2d at 286 ("An interlocutory appeal normally interrupts the trial even though it does not suspend the trial court's jurisdiction."). Discovery and other preparatory steps will accordingly proceed under the schedule being adopted by and with this opinion and order. However, if the court of appeals should grant an interlocutory appeal, then the proceedings in this court shall be stayed beginning with the date of such grant. *See*28 U.S.C. § 1292(d)(3) ("Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.").

CONCLUSION

In accord with RCFC 16(b) and RCFC Appendix A, ¶¶ 7-8, discovery and further pretrial steps shall proceed in accord with the following schedule:

Schedule

Event	*Deadline*
initial disclosures	November 1, 2007
initial interrogatories and document disclosure requests	November 20, 2007
disclosure of names of expert witnesses	December 28, 2007
production of expert reports	February 1, 2008
production of rebuttal expert reports	March 11, 2008
conclusion of fact discovery[16]	March 28, 2008
conclusion of expert discovery	April 30, 2008
submission of any motions for summary judgment (except for cross-motions)	May 30, 2008

The motions to amend pleadings filed by the Garreau (Hall) group [523], Anonymous Blair

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[16] Contrary to plaintiffs's request, there shall be no bar on depositions of individual plaintiffs or intervening plaintiffs absent court order. Instead, discovery including depositions shall proceed in accord with RCFC 26-37. If any discovery requests prove to be oppressive or unduly burdensome, the court will entertain a motion for a protective order under RCFC 26(b).

(Renaud) group [528, 529], Burley group [532], Anonymous Walker group [521-22, 534-537], Whipple group [538], Lafferty group [539], Lowe group [540], Kitto group [541], Enyard group [542], Zephier group [543],[17] Mozak group [547], Ferris group [551], Henry group [553], Trudell group [554], and Vassar group [555] are GRANTED. The motions to amend filed by plaintiffs [567] and by the Rocque group [524], Julia DuMarce group [545], Vadnais group [558], and Marvel DuMarce group [560] are GRANTED IN PART and DENIED IN PART.[18] They are granted insofar as they seek to add as plaintiffs and intervening plaintiffs newborns and persons already granted intervention as prior members of the extended Felix group.[19] In other respects, those motions are denied, and defendant's corresponding motions to strike in part [606, 587] plaintiffs's Fifth Amended Complaint [567] and the amended complaint proffered by the Rocque group [524] are

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[17] For good cause shown, the grant of the Zephier group's motion includes the addition as an intervening plaintiff of one person who is not a newborn. *See* Hr'g Tr. 27:23 to 28:10.

[18] Nancy Smith should be included within the Rocque group because she was listed in that group's initial complaint in intervention but was mistakenly deleted from the subsequently amended complaints. *See* Response of Rocque Group to Def.'s Mt. to Strike [620] at 4.

[19] In addition, plaintiffs and the Henry and Trudell groups of intervening plaintiffs shall provide for each minor plaintiff or intervening plaintiff a listing in electronic format of the minor's name, the adult plaintiff appearing as parent or guardian of the minor, and the particular capacity in which the adult is acting, *e.g.*, parent, guardian, etc.

GRANTED IN PART. The motion for leave to intervene by the Werner [St. Clair] group [548] is DENIED, without prejudice to the filing by that group of an original complaint in a separate action. The motion to clarify filed by the extended Felix group [506] is DENIED as moot.

Defendant's motion to certify orders for interlocutory appeal [510] is GRANTED IN PART and DENIED IN PART. That motion is granted insofar as the court certifies for interlocutory appeal the following two questions in connection with *this* order:

(1) Whether a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriations Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus; and

(2) If the Appropriations Acts created such a trust, whether Congress terminated that trust with enactment of the 1980 Act.

The motion in all other respects is denied. This court's proceedings shall *not* be stayed pending the government's filing of a petition with the court of appeals for interlocutory appeal, except that a stay shall automatically come into force if and when the court of appeals should grant interlocutory appeal.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-5018

SHELDON PETERS WOLFCHILD, et al., ERNIE PETERS LONGWALKER, et al., SCOTT ADOLPHSON, et al., MORRIS J. PENDLETON, et al., BARBARA FEEZOR BUTTES, et al., WINIFRED ST. PIERRE FEEZOR, et al., AUTUMN WEAVER, et al., ARIES BLUESTONE WEAVER, et al., ELIJAH BLUESTONE WEAVER, et al., RUBY MINKEL, et al., LAVONNE A. SWENSON, et al., WILLIS SWENSON, et al., AARON SWENSON, et al., BEVERLY M. SCOTT, et al., LILLIAN WILSON, et al., MONIQUE WILSON, et al., SANDRA COLUMBUS GESHICK, et al., CHERYL K. LORUSSO, et al., JENNIFER K. LORUSSO, et al., CASSANDRA SHEVCHUK, et al., JASON SHEVCHUK, et al., JAMES PAUL WILSON, et al., EVA GRACE WILSON, et al., BENITA M. JOHNSON, et al., and KEVIN LORUSSO, et al.,

Plaintiffs-Appellees,

and

HARLEY D. ZEPHIER, SR., et al.,

Plaintiffs-Appellees,

and

ELIZABETH T. WALKER, WALKER GROUP, and JOHN DOES 1-30,

Plaintiffs-Appellees,

and

GERTRUDE GODOY, et al., MICHAEL STEPHENS, et al., JESSE CERMAK, et al., DELORES KLINGBERG, et al., SALLY ELLA ALKIRE, et al., PIERRE GEORGE ARNOLD, JR., et al., and DENISE HENDERSON, et al.,

Plaintiffs-Appellees,

and

LOWER SIOUX INDIAN COMMUNITY,

Plaintiff-Appellee,

and

WINONA C. THOMAS ENYARD, et al., and JEFFREY ARNOLD KITTO, et al.,

Plaintiffs-Appellees,

and

MADALINE ROCQUE, et al., MARY TAYLOR (TATEWASTEWIN), et al., MARGARET (DUMARCE) PRESCOTT, et al., and JOSEPH COURSOLLE, et al.,

Plaintiffs-Appellees,

and

MARY BETH LAFFERTY, et al., ANITA D. WHIPPLE, et al., BONNIE RAE LOWE, et al., and LENOR A. SCHEFFLER BLAESER, et al.,

Plaintiffs-Appellees,

and

JULIA DUMARCE, et al.,

Plaintiffs-Appellees,

and

FRANCINE GARREAU HALL, et al.,

Plaintiffs-Appellees,

and

KRISTINE ABRAHAMSON, et al.,

Plaintiffs-Appellees,

and

VICTORIA ROBERTSON VADNAIS, et al.,

Plaintiffs-Appellees,

and

MARVEL JEAN DUMARCE, et al.,
and VIVIAN CORDELIA YOUNGBEAR, et al.,

Plaintiffs-Appellees,

And

DANNY LEE MOZAK,

Plaintiffs-Appellees,

DAWN BURLEY, RAYMOND COURNOYER, SR., FRANCIS ELAINE FELIX, REBECCA ELIZABETH FELIX, LYDIA FERRIS, LESLIE LEE FRENCH, DAWN HENRY, SANDRA KIMBELL, JERRY ROBINETTE, VERA A. ROONEY, DEBORAH L. SAUL, ROBERT LEE TAYLOR, DANIEL M. TRUDELL, LAURA VASSAR, CHARLENE WANNA, KE ZEPHIER, and JOHN DOES 31-433,

Plaintiffs,

v.

UNITED STATES,

Defendant-Appellant.

Appeal from the United States Court of Federal Claims in case 03-CV-2684, Judge Charles F. Lettow.

ORDER

(Filed Jun. 11, 2009)

A petition for rehearing en banc having been filed by the Appellees*, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 18, 2009.

FOR THE COURT,

/s/ Jan Horbaly /JB
Jan Horbaly
Clerk

Dated: 06/11/2009

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* Sheldon Peters Wolfchild, et al.

cc: Aaron P. Avila
All Appellees Counsel
Steven D. Gordon

WOLFCHILD V US, 2008-5018
(CFC – 03-CV-2684)

*Sheldon Peters Wolfchild, et al.

POWERS OF INDIAN GROUP ORGANIZED UNDER IRA BUT NOT AS HISTORICAL TRIBE

April 15, 1938.

Memorandum to Mr. Zimmerman, Assistant Commissioner of Indian Affairs.

In connection with the matter of calling elections on the constitutions for the Lower Sioux Indian Community and the Prairie Island Indian Community under the Pipestone jurisdiction, the two constitutions and the letters addressed to the two constitutional committees have been revised in this office to accord with certain legal principles.

Neither of these two Indian groups constitutes a tribe but each is being organized on the basis of their residence upon reserved land. After careful consideration in the Solicitor's Office it has been determined that under section 16 of the Indian Reorganization Act a group of Indians which is organized on the basis of a reservation and which is not an historical tribe may not have all of the powers enumerated in the Solicitor's opinion on the Powers of Indian Tribes dated October 25, 1934. The group may not have such of those powers as rest upon the sovereign capacity of the tribe but may have those powers which are incidental to its ownership of property and to its carrying on of business, and those which may be delegated by the Secretary of the Interior.

In the case of these two communities three of the powers listed in the constitutions have been found not to be within the permissible limits of the powers for

such group. These powers were the power to condemn land of members of the community, to regulate the inheritance of the property of members of the community, and to levy taxes upon members of the community. The first two powers were eliminated but the last was modified to restrict it to a permissible scope by allowing the levying of assessments upon members of the tribe for the use of community property and privileges. As these assessments would be incidental to the ownership of community property, it is considered that the community would be privileged to impose them. The reasons for these changes were reported to the Indians in the letters to the constitutional committees. It is believed that the Indians will have no objections to these changes but if they should have they may seek the postponement of the elections as already suggested in the letters addressed to the committees. The remaining powers were found justified on the basis of one of the above-mentioned principles. The power over law and order is made subject to review by the Secretary of the Interior and may be sustained as a delegation of power.

As these changes were legally necessary and did not involve considerations of policy and as there has been prolonged delay in calling the elections for these two communities, the above changes were made in this office without returning the files to the Indian Office. It is requested that you call this memorandum to the attention of the Organization Division in order that the above stated legal principles may be followed

in future cases of organization of Indians upon the basis of residence on a reservation.

Solicitor.

CONSTITUTION AND BYLAWS OF THE PRAIRIE ISLAND INDIAN COMMUNITY IN MINNESOTA

PREAMBLE

We, the Minnesota Mdewakanton Sioux residing on the Prairie Island Reservation under the Pipestone jurisdiction in the State of Minnesota, in order to form a more perfect union, develop our natural resources, insure our domestic tranquillity, promote the general welfare, to enjoy certain rights of home rule, to provide education in schools of higher learning including vocational, trade, high schools, and colleges for our people, and to secure the opportunities offered us under the Indian Reorganization Act, do hereby establish the following Constitution and Bylaws; and we solemnly affirm that it is our earnest intention faithfully to support, respect, and promote the integrity of the Constitution of the United States and the Constitution of the State of Minnesota, together with all laws pertaining thereto which are the constituted authority of our commonwealth.

ARTICLE I – NAME

SECTION 1. The name of this organization shall be the "Prairie Island Indian Community in the State of Minnesota."

ARTICLE II – TERRITORY

SECTION 1. The territory of the Prairie Island Indian Community shall be all the land now held in trust by the United States for the Minnesota Mdewakanton Sioux Indians within the confines of the Prairie Island Indian Reservation, and shall include such other lands as may in the future be acquired within or without said boundary lines by the Department of the Interior or by the Community for our use in the State of Minnesota.

* * *

ARTICLE IX – LAND

SECTION 1. *Land assignments.* – The land within the territory of the Prairie Island Indian Community which was purchased by the United States for the Mdewakanton Sioux residing in the State of Minnesota on May 20, 1886, and their descendants, may be assigned to any Minnesota Mdewakanton Sioux entitled thereto and may not be assigned to any other person although such person is a member of this Community. However, land purchased by or for the Prairie Island Indian Community may be assigned to any member of the Community.

SEC. 2. All applications for the assignment of land shall be made to the Community Council. In the case of an application for an assignment of the land above referred to, bought for certain Mdewakanton Sioux of Minnesota, the Council shall recommend to the Superintendent of the jurisdiction what action shall be taken. If the Superintendent, after consultation

with the Council and the interested parties, disagrees with the final recommendation of the Council, he shall refer the case to the Commissioner of Indian Affairs.

All assignments under this section shall be granted by or under the direction of the Secretary of the Interior, and evidenced by a certificate of assignment, which certificate shall be of the same force and effect as certificates of assignment issued previous to the organization of this Community. Such an assignment shall be known as a "Minnesota Mdewakanton Sioux Assignment."

SEC. 3. In the case of an application for an assignment of land which has been bought by or for this Community, the Council may approve or reject such application. The action of the Council shall be final and such action shall be reported to the Superintendent of the Pipestone jurisdiction within 10 days. An assignment under this section shall be known as a "Community Assignment".

SEC. 4. In any assignment of land, preference shall be given, first, to heads of families of Indian blood who are without land; and, secondly, to heads of families of Indian blood which shall have already received assignments consisting of less than an economic unit of agricultural land or other land of equal value, such economic unit to be determined by the Community Council in ordinances which shall be subject to review by the Secretary of the Interior or his designated representatives. If either the husband

or wife is not of Indian blood, such person is not to be considered as the head of a family under this section.

The Community Council may, if it sees fit, charge a fee of $5 on approval of an assignment made under section 3.

SEC. 5. No family shall at any time hold more than one assignment of land: *Provided, however,* That the Communiy [sic] Council may take into consideration the economic needs of a large and small family, a family being defined as a husband and wife, living together as such, whether there be children or not. In the event of a legal divorce or separation and there be children, the parent who provides for and maintains a home for the children shall be considered as the head of the family.

SEC. 6. If the holder of any land assignment absents himself, with his family, from residence upon his assignment for a period of 2 years, such absence becomes evidence that he has relinquished his claim to such assignment. It shall then be the duty of the Community Council, provided reasonable notice has been given, to declare the assignment vacated and notify the Superintendent of the Pipestone jurisdiction.

Any holder of a land assignment, excepting the aged and disabled within the confines of the corporate area, shall personally cultivate and use said land to the best of his ability, and cooperate with Federal and State experts for the proper development of the land.

SEC. 7. The Community Council may make all further regulations, by ordinances, as shall be necessary governing the use, lease under exceptional conditions, and inheritance of assigned land; *Provided, however,* That such ordinances shall be subject to review by the Secretary of the Interior insofar as they may affect "Minnesota Mdewakanton Sioux Assignments."

SEC. 8. Any holder of a land assignment who willfully neglects to make proper use of his assignment according to the ordinances prescribed by the Community Council governing the use and cultivation of such land, shall have his certificate of assignment subject to cancelation. It shall be the duty of the Community Council to warn such a person of the possibility of the loss of his assignment. If the assignee continues to neglect to make proper use of his land, it shall be the duty of the Community Council to notify the Superintendent of the Pipestone jurisdiction, who shall then take such action as he may deem necessary looking toward the proper cultivation and improvement of the land.

SEC. 9. Any member of this Community who shall transfer any land of which he is the owner to the United States in trust for this Community shall be entitled to an assignment of the same land or of other available land of equal value.

SEC. 10. Improvements of any character made upon assigned land may be willed to and inherited by members of the Prairie Island Indian Community,

and, if the improvements are made upon any "Minnesota Mdewakanton Sioux Assignment", they may also be willed to and inherited by any Minnesota Mdewakanton Sioux Indian entitled to such an assignment. When improvements are not possible of fair division, the Community Council shall dispose of them under such regulations as it may provide for the benefit of such heirs. No permanent improvements may be removed from any community or assigned land without the consent of the Community Council.

SEC. 11. No member of the Prairie Island Sioux Indian Community may use or occupy community lands except under an assignment or lease.

SEC. 12. Unassigned land shall be managed by the Community Council for the benefit of the members of the entire community in accordance with the regulations prescribed by the Secretary of the Interior under Section 6 of the Act of June 18, 1934 (48 Stat. 984).

SEC. 13. Community funds may be used, with the consent of the Secretary of the Interior, to acquire land for the Prairie Island Indian Community.

* * *

CERTIFICATION OF ADOPTION

Pursuant to an order, approved April 23, 1936, by the Secretary of the Interior, the attached Constitution and Bylaws were submitted for ratification to the members of the Minnesota Mdewakantion [sic] Sioux residing on the Prairie Island Reservation

under the Pipestone jurisdiction in the State of Minnesota and were on May 23, 1936, duly adopted by a vote of 35 for, and 4 against, in an election in which over 30 percent of those entitled to vote cast their ballots, in accordance with section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

MOSES WELLS
Chairman of Election Board.
WALTER LEITH
Chairman of the Community Council.
GRACE ROUILLARD
Secretary.

J. W. BALMER,
Superintendent

I, Harold L. Ickes, the Secretary of the Interior of the United States of America, by virtue of the authority granted me by the Act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attached Constitution and Bylaws of the Minnesota Mdewakanton Sioux residing on the Prairie Island Reservation under the Pipestone jurisdiction in the State of Minnesota.

All rules and regulations heretofore promulgated by the Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of the said Constitution and Bylaws are hereby declared inapplicable to the members of the Minnesota Mdewakanton Sioux residing on the

Prairie Island Reservation under the Pipestone jurisdiction in the State of Minnesota.

All officers and employees of the Interior Department are ordered to abide by the provisions of the said Constitution and Bylaws.

Approval recommended June 12, 1936
JOHN COLLIER,
Commissioner of Indian Affairs.

HAROLD L. ICKES,
Secretary of the Interior.
[SEAL]

WASHINGTON, *June 20, 1936.*

CONSTITUTION AND BYLAWS OF THE LOWER SIOUX INDIAN COMMUNITY IN MINNESOTA

PREAMBLE

We, the Minnesota Mdewakanton Sioux residing on the Lower Sioux Reservation under the Pipestone jurisdiction in the State of Minnesota, in order to form a more perfect union, develop our natural resources, insure our domestic tranquility, promote the general welfare, to enjoy certain rights of home rule, to provide education in schools of higher learning including vocational, trade, high schools, and colleges for our people, and to secure the opportunities offered us under the Indian Reorganization Act, do hereby establish the following Constitution and Bylaws; and we solemnly affirm that it is our earnest intention faithfully to support, respect and promote the integrity of the Constitution of the United States and the Constitution of the State of Minnesota, together with all laws pertaining thereto which are the constituted authority of our commonwealth.

ARTICLE I – NAME

SECTION 1. The name of this organization shall be the "Lower Sioux Indian Community in the State of Minnesota."

ARTICLE II – TERRITORY

SECTION 1. The territory of the Lower Sioux Indian Community shall be all the land now held in trust by the United States for the Minnesota Mdewakanton Sioux Indians within the confines of the Lower Sioux Indian Reservation, and shall include such other lands as may in the future be acquired within or without said boundary lines by the Department of the Interior or by the Community for our use in the State of Minnesota.

* * *

ARTICLE IX – LAND

SECTION 1. *Land Assignments.* – The land within the territory of the Lower Sioux Indian Community which was purchased by the United States for the Mdewakanton Sioux residing in the State of Minnesota on May 20, 1886, and their descendants, may be assigned to any Minnesota Mdewakanton Sioux entitled thereto, and may not be assigned to any other person although such person is a member of this Community. However, land purchased by or for the Lower Sioux Indian Community may be assigned to any member of the Community.

SEC. 2. All applications for the assignment of land shall be made to the Community Council. In the case of an application for an assignment of the land, above referred to, bought for certain Mdewakanton Sioux of Minnesota, the Council shall recommend to the Superintendent of the jurisdiction what action

shall be taken. If the Superintendent, after consultation with the Council and the interested parties, disagrees with the final recommendation of the Council, he shall refer the case to the Commissioner of Indian Affairs.

All assignments under this section shall be granted by or under the direction of the Secretary of the Interior, and evidenced by a Certificate of Assignment, which certificate shall be of the same force and effect as certificates of assignment issued previous to the organization of this Community. Such an assignment shall be known as a "Minnesota Mdewakanton Sioux Assignment."

SEC. 3. In the case of an application for an assignment of land which has been bought by or for this Community, the Council may approve or reject such application. The action of the Council shall be final and such action shall be reported to the Superintendent of the Pipestone jurisdiction within 10 days. An assignment under this section shall be known as a "Community Assignment."

SEC. 4. In any assignment of land, preference shall be given, first, to heads of families of Indian blood who are without land; and, secondly, to heads of families of Indian blood which shall have already received assignments consisting of less than an economic unit of agricultural land or other land of equal value, such economic unit to be determined by the Community Council in ordinances which shall be subject to review by the Secretary of the Interior or

his designated representatives. If either the husband or wife is not of Indian blood, such person is not to be considered as the head of a family under this section.

The Community Council may, if it sees fit, charge a fee of $5 on approval of an assignment made under section 3.

SEC. 5. No family shall at any time hold more than one assignment of land; *Provided, however*, That the Community Council may take into consideration the economic needs of a large and a small family, a family being defined as a husband and wife, living together as such, whether there be children or not. In the event of a legal divorce or separation and there be children, the parent who provides for and maintains a home for the children shall be considered as the head of the family.

SEC. 6. If the holder of any land assignment absents himself, with his family, from residence upon his assignment for a period of 2 years, such absence becomes evidence that he has relinquished his claim to such assignment. It shall then be the duty of the Community Council, provided reasonable notice has been given, to declare the assignment vacated and notify the Superintendent of the Pipestone jurisdiction.

Any holder of a land assignment, excepting the aged and disabled within the confines of the community area, shall personally cultivate and use said land to the best of his ability, and cooperate with

Federal and State experts for the proper development of the land.

SEC. 7. The Community Council may make all further regulations, by ordinances, as shall be necessary governing the use, lease under exceptional conditions, and inheritance of assigned land; *Provided, however*, That such ordinances shall be subject to review by the Secretary of the Interior insofar as they may affect "Minnesota Mdewakanton Sioux Assignments."

SEC. 8. Any holder of a land assignment who willfully neglects to make proper use of his assignment according to the ordinances prescribed by the Community Council governing the use and cultivation of such land, shall have his assignment subject to cancellation. It shall be the duty of the Community Council to warn such a person of the possibility of the loss of his assignment. If the assignee continues to neglect to make proper use of his land, it shall be the duty of the Community Council to notify the Superintendent of the Pipestone jurisdiction, who shall then take such action as he may deem necessary looking toward the proper cultivation and improvement of the land.

SEC. 9. Any member of this Community who shall transfer any land of which he is the owner to the United States in trust for this Community shall be entitled to an assignment of the same land or of other available land of equal value.

SEC. 10. Improvements of any character made upon assigned land may be willed to and inherited by members of the Lower Sioux Indian Community, and if the improvements are made upon any "Minnesota Mdewakanton Sioux Assignments", they may also be willed to and inherited by any Minnesota Mdewakanton Sioux Indian entitled to such an assignment. When improvements are not possible of fair division, the Community Council shall dispose of them under such regulations as it may provide for the benefit of such heirs. No permanent improvements may be removed from any community or assigned land without the consent of the Community Council.

SEC. 11. No member of the Lower Sioux Indian Community may use or occupy community lands except under an assignment or lease.

SEC. 12. Unassigned land shall be managed by the Community Council for the benefit of the members of the entire Community, in accordance with the regulations prescribed by the Secretary of the Interior under section 6 of the Act of June 18, 1934 (48 Stat. 984).

SEC. 13. Community funds may be used, with the consent of the Secretary of the Interior, to acquire land for the Lower Sioux Indian Community.

* * *

CERTIFICATION OF ADOPTION

Pursuant to an order, approved April 23, 1936, by the Secretary of the Interior, the attached Constitution and Bylaws were submitted for ratification to the members of the Minnesota Mdewakanton Sioux residing on the Lower Sioux Reservation under the Pipestone jurisdiction in the State of Minnesota and were on May 16, 1936, duly approved by a vote of 54 for, and 6 against, in an election in which over 30 percent of those entitled to vote cast their ballots, in accordance with section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

GEORGE ST. CLAIR,
Chairman of Election Board.
SAM BLUESTONE,
Chairman of the Community Council.
THOMAS BLUESTONE,
Secretary.

J. W. BALMER,
Superintendent.

I, Harold L. Ickes, the Secretary of the Interior of the United States of America, by virtue of the authority granted me by the Act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attached Constitution and Bylaws of the Minnesota Mdewakanton Sioux residing on the Lower Sioux Reservation under the Pipestone jurisdiction in the State of Minnesota.

All rules and regulations heretofore promulgated by the Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of the said Constitution and Bylaws are hereby declared inapplicable to the members of the Minnesota Mdewakanton Sioux residing on the Lower Sioux Reservation under the Pipestone jurisdiction in the State of Minnesota.

All officers and employees of the Interior Department are ordered to abide by the provisions of the said Constitution and Bylaws.

Approval recommended May 25, 1936.
JOHN COLLIER,
Commissioner of Indian Affairs.

HAROLD L. ICKES,
Secretary of the Interior.
[SEAL]

WASHINGTON, D. C., *June 11, 1936.*

CONSTITUTION
of the
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY
of
MINNESOTA

PURPOSE

We, the Indian people of the Shakopee Mdewakanton Sioux Community, in order to secure the advantages of local self-government for ourselves and our children, do ordain and establish this constitution.

ARTICLE I – TERRITORY

The territory of the Shakopee Mdewakanton Sioux Community shall consist of the four tracts of land located in Scott County, Minnesota, described in Appendix "A" attached hereto, now held in trust by the United States for the Minnesota Mdewakanton Sioux Indians and shall include such other lands as may be legally added thereto. The jurisdiction of the community over such lands shall not be inconsistent with applicable Federal and State laws.

ARTICLE II – MEMBERSHIP

Section 1. The membership of the Shakopee Mdewakanton Sioux Community shall consist of:

(a) All persons of Mdewakanton Sioux Indian blood, not members of any other Indian tribe, band or group, whose names appear on the 1969 census roll of Mdewakanton Sioux residents of the

Prior Lake Reservation, Minnesota, prepared specifically for the purpose of organizing the Shakopee Mdewakanton Sioux Community and approved by the Secretary of the Interior.

(b) All children of at least one-fourth (1/4) degree Mdewakanton Sioux Indian blood born to an enrolled member of the Shakopee Mdewakanton Sioux Community.

(c) All descendants of at least one-fourth (1/4) degree Mdewakanton Sioux Indian blood who can trace their Mdewakanton Sioux Indian blood to the Mdewakanton Sioux Indians who resided in Minnesota on May 20, 1886, Provided, they apply for membership and are found qualified by the governing body, and provided further, they are not enrolled as members of some other tribe or band of Indians.

Sec. 2. The governing body shall have power to pass resolutions or ordinances, subject to the approval of the Secretary of the Interior, governing future membership, adoptions and loss of membership.

* * *

APPROVAL

I, Harrison Loesch, Assistant Secretary of the Interior of the United States of America, by virtue of the authority granted to me by the Act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attached Constitution of the Shakopee Mdewakanton Sioux Community of Minnesota.

Approval Recommended:

/s/ TW Taylor
Acting Commissioner of Indian Affairs

/s/ Harrison Loesch
Assistant Secretary of the Interior

Washington, D. C.

Date: Nov 28 1969

INDIAN LAND CERTIFICATE

No. 45

TO ALL WHOM IT MAY CONCERN:

It is hereby certified that Morris Pendleton, (hereinafter termed assignee), who has been established as an eligible Mdewakanton Sioux Indian by reason of being a descendant of a Mdewakanton Sioux Indian who resided in Minnesota on May 20, 1886, or who was in the process of removing hereto and who had severed his or her tribal relations, has hereby been assigned the following described tract of land, viz:

Beginning at the Northwest corner of the SW1/4 SE1/4 Section 2, T. 112N., R. 35W., (1287 feet north of south 1/4 corner Section 2); thence North 2574 feet; thence East 330 feet; thence South 2574 feet; thence West 330 feet to point of beginning.

_____ in Redwood County, Minnesota, containing 19.5 acres, more or less, and subject to the following terms and conditions:

1. Assignee is entitled to immediate possession of the land for his or her lifetime, so long as he or she shall occupy and use the land.

2. The assignment evidence by this certificate is not transferable except by relinquishment to the United States of America or its successor in interest. Any sale, lease, transfer or encumbrance of this assignment, including any attempts to utilize this

assignment as security of any kind, is and will continue to be utterly void and of no effect.

3. The assignment evidence by this certificate shall terminate upon the death of the assignee, upon relinquishment by the assignee in writing or by cancellation by the Secretary of the Interior or his designated representative in the event that the assignee shall cease to use and occupy the land as his or her principal place of residence for a continuous period of 2 years.

4. Any structure placed on the premises by the assignee shall remain his or her personal property so long as this assignment is in effect and may be sold, encumbered, devised or inherited. Upon termination of this assignment, any such structure may be removed from the land within six months after the date of termination of the assignment. In the event that such structure has not been removed within six months after the date of termination of the assignment, or such structure has not been purchased or inherited by an eligible Mdewakanton Sioux Indian, as defined above, who has filed with the appropriate office of the Bureau of Indian Affairs an application for assignment of the land, then such structure shall be declared abandoned and title thereto shall become vested in the United States to be held in the same manner and for the same purpose as the land is held.

5. Upon termination of this assignment by death of the assignee, such land shall not be reassigned to any other eligible Mdewakanton Sioux

Indian for a period of six months after the date of termination to enable appropriate negotiations for acquisition or removal of any structures which may be located thereon. During that period, but in no case for longer than the six-month period, the surviving spouse and/or minor children of the assignee may be permitted to continue to occupy the premises until the structure or structures are either removed, acquired through sale or devise, or declared abandoned.

6. Upon termination of this assignment by death of the assignee, such of the lawful heirs of the assignee as are themselves eligible Mdewakanton Sioux Indians, as defined above, shall be given preference in the reassignment of the land, provided that he, she or they file with the appropriate office of the Bureau of Indian Affairs within six months after the date of termination an application for an assignment on the land accompanied by evidence that he, she or they have secured title to any structure or structures which may have been placed on the land by the assignee.

IN TESTIMONY WHEREOF, I, Robert H. Schoewe, Acting _____, Area Director, Minneapolis Area Office, Bureau of Indian Affairs, have hereunto set my hand and caused the seal of this office to be hereto attached

at the City of Minneapolis, Minnesota, this 13th day of December, ~~1976.~~ 1979.

/s/ Robert H. Schoewe
Acting Area Director
Minneapolis Area Office
Bureau of Indian Affairs

7. The Assignee must occupy the tract as his permanent residence within (12) months of the date of approval of this certificate or it will be subject to cancellation by the Area Director.

COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY
COUNTY OF SCOTT STATE OF MINNESOTA

LANNY ROSS, Plaintiff, vs. SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, Defendant.	)	Court File No. 013-91

MEMORANDUM OPINION AND ORDER

Summary

In this case, the Court is called upon to consider the validity of an ordinance which, from the record before us, has formed the basis for relative stability within the Shakopee Mdewakanton Sioux Community for a period of nearly four years, in light of Article VI of the Community's Constitution. Because we are asked to overturn an action of the Community's General Council, the question presented is perhaps the most difficult that this Court has faced.

It is made more difficult because of the factual background which underlies the challenged action. For a number of years, before and including 1988, the Community lived in nearly constant turmoil. In no small part this turmoil was a product of three facts: the Community's businesses were generating

substantial monies; a significant share of those monies were being distributed "per capita" to the Community's membership; and the right of various persons to participate in these "per capita" payments repeatedly was disputed by other persons within the Community.

No useful purpose would be served by a recitation of the specifics of that history. Suffice it to say that the files of the Federal courts and Federal agencies, not to mention the file cabinets of many attorneys, are littered with records of disputes which had, at their base, understandable desires on the part of some to participate in the Community's resources, justifiable fears that such participation would be denied by others, and profound doubts that there was any forum which had jurisdiction to respond.

During the period from 1983 to 1988, the Community operated under an Ordinance which mandated that all persons receiving "per capita" payments be residents of the Community's reservation, and that any member who had left the Reservation and returned not receive such payments for a period of one year following their return. In 1988, the Community's General Council took two actions aimed at stilling the fears of persons receiving per capita payments: In the late winter of 1988, it created this Court. And on December 29, 1988, it passed Ordinance No. 12-29-88-002. That ordinance listed the persons who on that date were receiving "per capita" payments, and it stated that, barring two separate affirmative votes of two-thirds of the

Community's membership, those would continue to receive such payments. Ordinance No. 12-29-88-002 also stated that, barring two separate affirmative votes of two-thirds of the Community's membership, no other persons (except certain minors), regardless of their membership in the Community, would in the future be eligible to receive payments.

In this case, this Court – one of the two structures that was established to bring stability to the Community – has been asked to declare that a portion of Ordinance No. 12-29-88-002, the second such structure, violates Article VI of the Constitution of the Shakopee Mdewakanton Sioux Community. In one of the ironies that characterizes much of life, we find that we must do so.

Our holding is narrow, and at least pending further proceedings, it is only prospective in its effect. Specifically, our holding is that, while the Shakopee Mdewakanton Sioux Community could, consistent with Article VI of its Constitution, establish Reservation residency requirements which members would be required to meet before they could receive "per capita" payments, it could not, consistent with Article VI, remove those residency requirements and still deny per capita payments to the members to whom payments were not being made because of their prior absence from the Community's Reservation. Therefore, we today direct the Community to commence making per capita payments to Ross.

We believe that we do not now have before us a record sufficient to decide whether the effect of this order either can or should be made retroactive. We therefore also direct the parties to discuss with the Court a briefing schedule on this issue.

Discussion

The parties agree that there are no disputes with respect to any material facts, and have placed this matter before us on cross motions for summary judgment.

The facts are these: The Plaintiff, Lanny Ross, is a member of the Community. (He notes that he is a "charter member", which is true enough because his name does appear on the roll of the Community developed in 1969, but no consequence flows from this fact because nothing in the Community's governing documents distinguishes the rights of "charter members" from those of other members). When the Community adopted its residency requirements in 1983, Ross did not reside on the Reservation. Therefore, his name did not appear on a list of persons whom the Community deemed to be eligible to receive "per capita" payments at that time. Ross returned to the Community in 1988, but on December 29, 1988, when Ordinance No. 12-29-88-002 was adopted, he had not yet been a resident for twelve months, and therefore was not receiving payments.

With respect to residency and "per capita" payments, Ordinance No. 12-29-88-002 provides:

Section 4 – Reservation Residency Not Required – There shall be no requirement that recipients of per capita payments otherwise qualified shall maintain their residence on the Shakopee Mdewakanton Sioux Community Reservation. Payments and program benefits shall be available to community members and persons otherwise qualified whether or not those persons actually reside on the Shakoopee [sic] Mdewakanton Sioux Community Reservation.

As to the persons who are to [sic] eligible to receive such payments, the Ordinance states:

Section 8 – Final and Exclusive List of Eligible Recipients – The list of persons on the Roll of Adults, and the Roll of Minors and their descendants, shall comprise the final and exclusive list of persons entitled to receive payments and other benefits from the prsent [sic] and future businesses of the Shakopee Mdewakanton Sioux Community. Excepting only those described in Section 6 [which section pertains to certain trusts for minors], no further additions shall be made. No person listed on the Roll of Adults, and no minor child of those persons, now named on the Roll of Minors, and those who may subsequently be certified as qualifying for for [sic] addition to the Rolls pursuant to Section

> 6 of this Ordinance, shal [sic] ever be denied payments or benefits, and the value of the property right of each person on the Roll of Adults and the Roll of Minors shall be maintained at an equal level with the value of the property rights of the others named on those Rolls.

The Roll of Adults included all members of the Community (and some other persons) – save only for four persons whose names appeared on a separate list, denominated "List C – Persons eligible or enrolled for voting membership not now receiving benefits". Those four people were Ross, Charlie Vig, Pat Welch, and Dave Blue. Following the adopting of Ordinance 12-29-88-002, the General Council voted on the question of whether the names on List C should be added to the Roll of Adults. The vote was 21 for, 29 against, with 5 abstaining. Since December 12, 1988, Ross has lived on the Reservation and has been permitted to vote in the General Council and in the Community's elections; but he has not received "per capita" payments.

Article VI of the Community's Constitution provides:

> All members of the community shall be accorded equal opportunities to participate in the economic resources and activities of the community.

The parties have disputed at great length the effect of this provision; but neither party really has

provided a defining explanation for its position. Ross' principal contention is that "per capita" payments are economic resources of the Community, and that the effect of Article VI is to require that he receive an equal distribution of those resources. The difficulty with this argument is that it begs the question. On occasion, in the materials submitted to the Court, Ross appears to assert that under all circumstances Article VI establishes a right to equal distributions among all voting members, with no distinctions being permissible among such members. And he makes variations on this argument, asserting that the Community's denial of payments to him is a denial of a property right without due process of law, in violation of the due process and equal protection guarantees of the Indian Civil Rights Act of 1968. 25 U.S.C. 1302. But those arguments stand or fall on the resolution of the fundamental question. He has a right to protect only if Article VI gives him a right to receive payments.

The Community's arguments also miss the mark to some extent. The Community correctly notes that Article V of the Constitution gives the General Council the authority to "manage all economic affairs and enterprises of the community". But the provisions of Article V do not negate the effect, whatever it may be, of Article VI. The Community stresses the fact that one of the most fundamental powers of an Indian tribe is the power to determine its own membership. But the Community has decided its own membership, and Ross is a member. The question is:

what does Article VI mean for members. The Community asserts that the acceptance of Ross' arguments would mean that each member would be guaranteed an equal share of all Community resources – that the Community could never establish programs, such as education and health care programs, which would distinguish between members based on their need. Ross rejects that argument as a "straw man" (or, in oral argument, as a "straw horse"); but he does not explain what exactly Article VI does mean.

In the view of the Court, however, at least three things are clear.

First, Article VI clearly was not intended to, and does not, preclude the Community from establishing programs based on members' need or on circumstances, or establishing appropriate standards for the dispostion [sic] of the Community's resources. Far more specific language would be required than that used in Article VI, to reach such a result. It is our view that the equal protection analysis generally employed in interpreting the Fourteenth Amendment to the United States Constitution, imposed upon the Community's actions by the Indian Civil Rights Act of 1968, in most cases is probably the appropriate one for interpreting Article VI. The manner in which the "rational relationship" and "strict scrutiny" formulae that traditionally are applied in Fourteenth Amendment cases may change in the context of the Community and its circumstances; but at least the Community's government is not required to be merely

a vessel to pass along all Community property in equal shares to all members.

This leads us to our second conclusion, which is that the Community did not violate either the provisions of Article VI or of the Indian Civil Rights Act when, in 1983, it established both the requirements that a person be a resident of the Reservation in order to receive "per capita" payments, and that members who returned to the Reservation then reside thereon for twelve months before becoming eligible for payments. The Community is tiny, both in terms of its membership and its land base. In 1983, it also was tiny in terms of its resources. It was not an unreasonable choice for the Community to hold its "per capita" payments within the boundaries of the Reservation, where the General Council could reasonably conclude they were most needed. Also, when money suddenly was appearing where it had not been before, it was not unreasonable for the General Council to require members who had left the Reservation to demonstrate a commitment to the Community, in the form of a one-year waiting period, before permitting them to partake of the Community's resources. Therefore, insofar as Ross claims per capita payments from 1983 through December 29, 1988, his claim must fail.

But third, under Article VI, the decision of the General Council on December 29, 1992 to eliminate the residency requirement for most members (to permit them to leave the Reservation and retain their rights to payment), but to retain forever the effect of

the residency requirement on Ross (so that only by two affirmative votes of two-thirds of the Community's entire membership could he participate in payments, regardless of where he lives) is impermissible. It did not have the effect of holding vital monies on the Reservation. To the contrary, since Ross is a resident and is not receiving payments, while many other members who are receiving payments presumably may have left, the effect may well have been the reverse. It also did not have the effect of eliciting a demonstration from anyone to the Community. Indeed, the only apparent effect is to penalize members who happen to have failed to return to the Reservation in time to be eligible to leave again with payments in hand.

No purpose permissible under the "equal opportunities" language of Article VI can possibly be served by such a result. The Court is fully cognizant of the fact that members of the Community may well feel as though their residence on the Reservation during the troubled times preceding December 29, 1988 entitles them to special consideration, as against members who were not on the Reservation at that time. And indeed, they might be correct – if the same residency requirements applied to all members. But when the requirements have been lifted for some, in the view of the Court they must be lifted as to all.

Therefore, it is clear to us that we must order that Ross be given "per capita" payments, commencing immediately. Whether, however, this Court has the authority to order that Ross be compensated for payments he did not receive from December 29, 1988

to the present, and whether – whatever our authority – it is appropriate for us to enter such an order, is a matter we do not now decide. The parties have not briefed this issue, and in our view, considering the amounts that may be at issue, the Court must have the benefit of the parties' views.

ORDER

For the foregoing reasons, it is herewith ORDERED:

1. That the Defendant's Motion for Summary Judgment is granted, insofar as it relates to per capita payments made during the period prior to December 29, 1988; and

2. That the Plaintiff's Motion for Summary Judgment is granted, insofar as it relates to per capita payments made following the date of this Order; and

3. That on or before July 24, 1992, counsel for the parties are directed to inform the Court of their schedule, to permit the Court to establish a briefing schedule with respect to the matters that remain undecided in this litigation.

July 17, 1992

/s/ Kent P. Tupper
Kent P. Tupper
Chief Judge

/s/ John E. Jacobson
John E. Jacobson
Associate Judge

Appropriation Act of June 29, 1888, 25 Stat. at 228

* * *

SIOUX, MEDAWAKANTON BAND.

For the support of the full-blood Indians in Minnesota, belonging to the Medawakanton band of Sioux Indians, who have resided in said State since the twentieth day of May, A.D. eighteen hundred and eighty-six, and severed their tribal relations, twenty thousand dollars, to be expended by the Secretary of the Interior in the purchase, in such manner as in his judgment he may deem best, of agricultural implements, cattle, horses, and lands:

* * *

Appropriation Act of March 2, 1889, 25 Stat. at 992

* * *

SIOUX, MEDAWAKANTON BAND.

For the support of the full-blood Indians in Minnesota, heretofore belonging to the Medawakanton band of Sioux Indians, who have *resided in said State* since the twentieth day of May eighteen hundred and eighty-six, or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations, twelve thousand dollars, to be expended by the Secretary of the Interior as follows: Ten thousand dollars in the purchase, as in his judgment he may think best, of such lands,

agricultural implements, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these Indians or family thereof; * * * shall be so expended that each of the Indians in this paragraph mentioned shall received [sic], as nearly as practicable, an equal amount in value of this appropriation * * * *And provided further*, That as far as practicable lands for said Indians shall be purchased in such locality as each Indian desires, and none of said Indians shall be required to remove from where he now resides and to any locality or land against his will.

* * *

Appropriation Act of August 19, 1890, 26 Stat. at 340

* * *

SIOUX, MEDAWAKANTON BAND.

For the support of the full and mixed blood Indians in Minnesota heretofore belonging to the Medawakanton band of Sioux Indians, who have resided in said State since the twentieth day of May, eighteen hundred and eighty-six, or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations, eight thousand dollars, to be expended by the Secretary of the Interior, as in his judgment he may think best, for such lands, agricultural implements, buildings, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these

Indians or families thereof: * * * shall be so expended that each of the Indians in this paragraph mentioned shall receive, as nearly as practicable, an equal amount in value of this appropriation: *And provided further*, That, as far as practicable, lands for said Indians shall be purchased in such locality as each Indian desires, and none of said Indians shall be required to remove from where he now resides and to any locality or land against his will.

* * *

Act of December 19, 1980,
Pub.L. No. 96-557, 94 Stat. 3262

An Act to provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux of Minnesota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); the Act of March 2, 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter be held by the United States – ,

(1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) with respect to the some 572.5 acres of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota; and

(3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust

for the Prairie Island Indian Community of Minnesota.

Sec. 2. The Secretary of the Interior shall cause a notice to be published in the Federal Register describing the lands transferred by section 1 of this Act. The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

Sec. 3. Nothing in this Act shall (1) alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

1934 Indian Reorganization Act

* * *

25 U.S.C. § 462

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.

25 U.S.C. § 463

(a) Protection of existing rights

The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act . . .

* * *

25 U.S.C. § 465

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee

be living or deceased, for the purpose of providing land for Indians.

* * *

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. § 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

* * *

25 U.S.C. § 479

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendents of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood . . . The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

62 Fed.Cl. 521

United States Court of Federal Claims.
Sheldon Peters WOLFCHILD, et al., Plaintiffs,
v.
UNITED STATES, Defendant.

No. 03-2684L.

Oct. 27, 2004.

Erick G. Kaardal, Mohrman & Kaardal, P.A., Minneapolis, MN, for plaintiffs. With him on the briefs were William F. Mohrman and Eric L. Lipman.

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Joe Halloran, Jacobsen, Buffalo, Schoessler & Magnuson, Ltd., St. Paul, MN for amicus curiae Prairie Island Indian Community in Minnesota.

Raymond Cermak, Sr., Vadnais Heights, MN, pro se, as amicus curiae.

OPINION AND ORDER

LETTOW, Judge.

This dispute concerns the United States' management of property originally provided for the benefit of those Mdewakanton Sioux who were loyal to the United States during the Sioux Outbreak in Minnesota during 1862. The property at issue consists of land, improvements to land, and monies derived from special funds provided by the United States in appropriations statutes enacted in 1888, 1889, and 1890. For approximately ninety years, the property acquired by and generated from the specially appropriated funds was maintained by the United States for the use and benefit of the loyal Mdewakanton and their lineal descendants. However, in 1980, a statute was enacted that was used by the Department of Interior as a basis for disbursing the property to three Indian communities that are not exclusively comprised of lineal descendants of the loyal Mdewakanton. Non-descendants allegedly comprise a majority of the members of two of the communities. The plaintiffs aver they are lineal descendants of the loyal Mdewakanton, and they bring before the court claims of breach of fiduciary duty and contract by the United States. The government has filed a motion to dismiss, arguing that this court lacks subject matter jurisdiction and that the complaint fails to state a claim upon which relief may be granted. Plaintiffs have filed a cross-motion for partial summary judgment that a trust exists for the benefit of the lineal descendants, that the government has

breached its fiduciary duties, and that a contract exists and has been breached.

Over 250 individuals are currently named plaintiffs in this action. The plaintiffs have filed a motion for leave to amend their complaint to include yet additional named and anonymous plaintiffs, claiming with respect to the anonymous plaintiffs that a substantial number of them are members of the communities that now hold the property, that the remainder of them are applicants for membership, and that their membership status in those communities would be put in jeopardy if disclosure were to be made that they were plaintiffs in this action.

Motions for leave to participate as *amicus curiae* have been filed on behalf of each of the three Indian communities that have succeeded to property at issue in this case, *viz.*, the Lower Sioux Indian Community in Minnesota, the Shakopee Mdewakanton Sioux (Dakota) Community, and the Prairie Island Indian Community in Minnesota. The movant communities seek to inform the court of the basis for their interest in the property and their interest in preserving their alleged authority as sovereigns over the property. Plaintiffs oppose these motions. In addition, one individual, Raymond Cermak, Sr., has moved for leave to participate as an *amicus curiae*, averring that he is a lineal descendant of the loyal Mdewakanton and that he previously received direct payments of trust monies from the government as a lineal descendant. Plaintiffs also oppose Mr. Cermak's motion.

For the reasons stated below, the government's motion to dismiss is granted in part and denied in part. The plaintiffs' cross-motion for partial summary judgment is also granted in part and denied in part. The plaintiffs' motion for leave to amend their complaint is granted, as is the motion for leave for some plaintiffs to participate anonymously. The motions by each of the communities to participate as *amicus curiae* are granted as is the motion by Raymond Cermak, Sr.

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BACKGROUND[1]

The 1862 Sioux Outbreak

Prior to 1862, the Minnesota Sioux consisted of four bands known as the Mdewakanton and the Wahpakoota (together comprising the "lower bands"), and the Sisseton and the Wahpeton (known as the "upper bands" or the "Santee Sioux"), all of whom lived along the Minnesota River. *See Medawakanton and Wahpakoota Bands of Sioux Indians v. United States,* 57 Ct.Cl. 357, 359-61, 1922 WL 1863 (1922).[2] In August of 1862, young traditionalists in these four bands waged war against the United States, killing more than 500 white settlers and damaging substantial property. *See id.* at 362; *see also* Pls.' Ex. 36, at 187 (William Watts Folwell, *A History of Minnesota* (vol.II, 1924)). After defeating the bands, the United States punished the Sioux by nullifying its treaties with them, among other things voiding annuities that had been granted as part of the terms of the

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[1] The facts set forth do not constitute findings of fact by the court. They are drawn from the Plaintiffs' Complaint ("Compl.") and First Amended Complaint ("Am.Compl."), the recitations of the parties in their oral arguments, motions, responses, replies, and other briefs, and from the materials provided to the court by *amici curiae*. The factual recitation has been presented to provide a basis for analysis of the issues raised in this case.

[2] The Minnesota Sioux were also known as the Sioux of the Mississippi. By contrast, the Teton, Yankton, and Yanktonais Sioux were known as the Sioux of the Missouri.

treaties. *See* Act of Feb. 16, 1863, 12 Stat. 652.[3] The government also moved the Sioux to tracts of unoccupied land outside the limits of the then-existing states, including Minnesota and Iowa, which originally resulted in their moving to Dakota Territory. *Medawakanton*, 57 Ct.Cl. at 364-65. In February 1866, they relocated to a new reservation in Nebraska. *Id.*

Some of the Sioux, however, had been loyal to the United States during the Sioux Outbreak, and these loyalists were permitted to stay on the Minnesota lands provided for the Sioux under the treaties. After

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[3] An annuity had been granted in perpetuity pursuant to a treaty made by the United States with certain chiefs and bands of the Sioux, perhaps only the Mdewakanton Band, on September 29, 1837. *See* 7 Stat. 538. A separate treaty was made between the United States and the Mdewakanton and Wahpakoota Bands of the Minnesota Sioux on August 5, 1851, 10 Stat. 954, which, among other things, provided for a supplemental annuity payable for a fifty-year term. *See Medawakanton*, 57 Ct.Cl. at 360-61. The Sisseton and Wahpeton Bands signed a comparable treaty on July 23, 1851. *Id.*

After the treaties were nullified, the annuities ceased. *Id.* Eventually, however, the tribal bands recovered the present value of the annuities: the Sisseton and Wahpeton Bands by a 1906 Act of Congress enabling them to sue in the Court of Claims and by a judgment in *Sisseton and Wahpeton Bands v. United States*, 42 Ct.Cl. 416, 432[, 1907 WL 895] (1907), and the Mdewakanton and Wahpakoota through a special act of Congress approved March 4, 1917 and a consequent case in the Court of Claims. *See* 39 Stat. 1195 ("An act for the restoration of annuities to the Medawankanton and Wahpakoota (Santee) Sioux Indians, declared forfeited by the Act of February 16, 1863"); *Medawakanton*, 57 Ct.Cl. at 358.

Congress stripped the Sioux of their Minnesota lands, it authorized the Department of Interior to allocate up to eighty acres of that land to each loyalist:

> [T]he Secretary of the Interior is hereby authorized to set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual of the before-named bands who exerted himself in rescuing whites from the late massacre [by] said Indians. The land so set apart . . . shall be an inheritance to said Indians and their heirs forever.

Act of Feb. 16, 1863, 12 Stat. at 654. Recognizing further that many of the loyal Sioux had lost their homes and property because of their aid to whites, and that "now they cannot return to their tribe . . . or they would be slaughtered for the part they took in the outbreak," Cong. Globe, 38th Cong., 1st Sess. 3516 (1864), Congress appropriated $7500 for the loyal Sioux in 1865. Act of Feb. 9, 1865, 13 Stat. 427.

The 1886 Census and the 1888, 1889, and 1890 Appropriations Acts

The allocation of land to the loyal Sioux was not successfully implemented, and Congress further provided for the loyal Mdewakanton in 1888, when it authorized the Department of Interior to expend funds for them. Congress recognized that when it declared the Sioux's treaties, annuities, and allocation of land forfeited, it failed to make an exception for the loyal Mdewakanton, whose annuity was valued at

approximately $1,000,000. 19 Cong. Rec. H2976-77 (daily ed. Apr. 14, 1888) (statement of Rep. MacDonald). As a result of this oversight, many loyal Mdewakanton were rendered homeless. *Id.* at 2977. The 1888 Act provided an appropriated amount of $20,000 to be spent by the Secretary of Interior in purchasing land, cattle, horses, and agricultural implements for those full-blooded Mdewakanton who resided in Minnesota on May 20, 1886 and who had severed their tribal relations.[4] Because of the administrative difficulty of determining which Mdewakanton were loyal during the Sioux Outbreak, Congress determined that presence in Minnesota on May 20, 1886 served as an adequate proxy for "friendliness." Pls.'

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[4] The statutory text pertaining to the loyal Mdewakanton provided as follows:

> For the support of the full-blood Indians in Minnesota, belonging to the Medawakanton band of Sioux Indians, who have resided in said State since the twentieth day of May, A.D. eighteen hundred and eighty-six, and severed their tribal relations, twenty thousand dollars, to be expended by the Secretary of the Interior in the purchase, in such manner as in his judgment he may deem best, of agricultural implements, cattle, horses, and lands: *Provided,* That of this amount the Secretary if he may deem it for the best interests of said Indians, may cause to be erected for the use of the said Indians at the most suitable location, a school house, at a cost not exceeding one thousand dollars: *And provided also,* That he may appoint a suitable person to make the above-mentioned expenditures under his direction, the expense of the same to be paid out of this appropriation.

Act of June 29, 1888, 25 Stat. 217, 228-29.

Ex. 16 (Memorandum from Nat'l Tech. Servs. Found. to Bureau of Indian Affairs (October 1979)).

A similar appropriation act in 1889 added a further sum of $12,000 and included a provision calling for each loyal Mdewakanton to receive as close to an equal amount as practicable. Act of Mar. 2, 1889, 25 Stat. 980, 992-93.[5] In a third appropriation

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[5] The pertinent portion of the 1889 appropriation act reads as follows:

> For the support of the full-blood Indians in Minnesota heretofore belonging to the Medawakanton band of Sioux Indians, who have resided in said State since the twentieth day of May eighteen hundred and eighty-six, or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations, twelve thousand dollars, to be expended by the Secretary of the Interior as follows: Ten thousand dollars in the purchase, as in his judgment he may think best, of such lands, agricultural implements, seeds, cattle, horses, food, or clothing as may be deemed best in the case of each of these Indians or family thereof; one thousand dollars, or so much thereof as may be necessary, to defray the expenses of expending the money in this paragraph appropriated; and one thousand dollars for the completion and furnishing of the schoolhouse for said Indians authorized by [the 1888 Act]: *Provided,* That if the amount in this paragraph appropriated . . . shall not be expended within the fiscal year for which either sum was appropriated, neither shall be covered into the Treasury, but shall, notwithstanding, be used and expended for the purposes for which the same amount was appropriated and for the benefit of the above-named Indians: *And provided also,* That the Secretary of the Interior may appoint a suitable person to make the above-mentioned expenditure under

(Continued on following page)

act in 1890, Congress added $8,000 and adopted the same substantive provisions as the 1889 Act, except that it expressly stated that the further appropriated amount was to support Indians of both "full and mixed blood." Act of Aug. 19, 1890, 26 Stat. 336, 349. Overall, the value of the appropriations amounted to $20,000 awarded in 1888, $12,000 in 1889, and $8,000 in 1890. The latter two acts called for funds to carry over if the Department of Interior did not spend them by the end of the fiscal year, ensuring that the loyal Mdewakanton would benefit from the appropriation.[6]

To ascertain which Mdewakanton lived in Minnesota on May 20, 1886, U.S. Special Agent Walter McLeod took a census listing all of the full-blood

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> his direction; and all of said money which is to be expended for lands, cattle, horses, implements, seeds, food, or clothing shall be so expended that each of the Indians in this paragraph mentioned shall received [sic], as nearly as practicable, an equal amount in value of this appropriation and that made by said act of June twenty-ninth, eighteen hundred and eighty-eight: *And provided further,* That as far as practicable lands for said Indians shall be purchased in such locality as each Indian desires, and none of said Indians shall be required to remove from where he now resides and to any locality against his will.

Id.

[6] Appropriations to the loyal Mdewakanton under the 1888, 1889, and 1890 Acts were subtracted from the damage award entered in favor of the Mdewakanton in 1922 by the Court of Claims in recompense for the nullified annuities. *Medawakanton*, 57 Ct.Cl. at 367.

Mdewakanton, which was mailed to the Commissioner of Indian Affairs on September 2, 1886. *See* Pls.' Ex. 1 (Enrollment of the Medawankanton Band of Sioux Indians of Minnesota); Pls.' Ex. 15 (Letter from Special Agent Walter McLeod to Commissioner of Indian Affairs (Sept. 2, 1886)). Although the census was not prepared as of May 20, 1886, inclusion on the McLeod list has been deemed to create a rebuttable presumption that an individual met the requirements of the subsequent 1888, 1889, and 1890 Acts. *See, e.g.*, Pls.' Ex. 20, at 2 (Memorandum from the Acting Associate Solicitor to the Field Solicitor (Aug. 19, 1971)). On January 2, 1889, Robert B. Henton, Special Agent for the Bureau of Indian Affairs, took a second census of those Mdewakanton living in Minnesota since May 20, 1886. *Id.* This second census was done at the request of the Secretary of the Interior, who wanted "information as complete as possible." Pls.' Ex. 17, at 2 (Letter from Secretary of Interior to Commissioner of Indian Affairs (Oct. 12, 1888)). The McLeod and Henton listings (together, "the 1886 census") were used to determine who would receive the benefits of the amounts appropriated under the 1888, 1889, and 1890 Acts.

The funds provided by these Acts were used for the purchase of land, agricultural implements, livestock, and goods for the loyal Mdewakanton. The lands purchased were commonly called the "1886 lands" to reflect the effective date of the census that defined the beneficiaries. The lands were purchased in three separate areas of Minnesota, and by 1980

they consisted of (1) approximately 260 acres in Scott County (the "Shakopee" lands), (2) approximately 575 acres in Redwood County (the "Lower Sioux" lands), and (3) approximately 120 acres in Goodhue County (the "Prairie Island" lands). H.R.Rep. No. 96-1409, at 4 (1980).[7]

Trust Creation and Land Assignments

Rather than conveying the acquired land directly to the loyal Mdewakanton for whom the land had been purchased, the Department of Interior, fearing sale or destruction of the property, kept title in the

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[7] Three prior acts had also allocated funds for the purchase of lands. *See* Act of July 4, 1884, 23 Stat. 1887; Act of Mar. 3, 1885, 23 Stat. 375; Act of May 15, 1886, 24 Stat. 39. The 1884 and 1885 Acts expressly required the beneficiaries to be "those of the Mdewakanton Band, who remained faithful to the whites during the outbreak of 1862-3 . . . and for the descendants of those friendly Indians." Def.'s Ex. 4, at 275 n.4 (Roy W. Meyer, *History of the Santee Sioux* (1993)) ("*History of the Santee*"). Walter McLeod was appointed on October 16, 1886 to purchase the lands, and he paid $4,103 for 339.70 acres of land. Pls.' Ex. 23, at 111 (1891 Comm'r of Indian Affairs Ann. Rep.). Much of this land was deeded to individual Indians in fee simple. *History of the Santee* at 279. Some of the beneficiaries sold the land, mortgaged it, or removed its resources. *Id.* at 283; Pls.' Ex. 18, at 3 (Letter from Ass't Comm'r of Indian Affairs to Sec'y of Interior (Sept. 30, 1915)). Robert Henton was appointed on October 20, 1888 to make additional purchases, and he spent $16,581.42 in acquiring 1, 100.99 acres of land. Pls.' Ex. 23, at 111 (1891 Comm'r of Indian Affairs Ann. Rep.). This land was retained by the United States on behalf of the Mdewakanton to avoid repeating the sale, mortgage, and depletion of prior lands. *History of the Santee* at 283.

United States' name but made arrangements for the lands to be made available to the loyal Mdewakanton. The mechanism chosen for that purpose was an assignment system by which a specific parcel of land would be assigned to a particular beneficiary who could use and occupy the land as long as he or she wanted, but if the assignee did not use it for two years, it would be reassigned. Because the legislation called upon the Secretary of Interior to expend the funds as he deemed best, and in the absence of legislation requiring transfer of title, the assignment policy persevered over the years. *See, e.g.*, Pls.' Ex. 18, at 6 (Letter from Assistant Comm'r of Indian Affairs to Sec'y of Interior (Sept. 30, 1915)).

Some of the land purchased for the Mdewakanton was not arable; one parcel was next to a brickyard where many Mdewakanton worked, and its only usable resource was clay. At the request of the Mdewakanton, Congress considered a bill permitting the Secretary of Interior to sell this tract of land. In debating an amendment to require each Mdewakanton's consent to the sale, which ultimately passed, Senator Pettigrew argued that "[i]t is not an Indian reservation. These Indians own the homes, and they have a right there greater than that of reservation Indians. The land was purchased for their benefit, and the title is in them subject to a provision by which they can not convey it." 34 Cong. Rec. 2523 (1901). The bill providing for the land sale was enacted, and the Secretary was empowered to sell the land provided that "the written consent of the adult

Indians residing in Redwood County, Minnesota, shall first be given." Act of Feb. 25, 1901, 31 Stat. 805, 806. The 1901 Act effectively constituted an explicit recognition by Congress that a trust had been created and funded by the appropriations made under the 1888, 1889, and 1890 Acts. By requiring the consent of the beneficiaries for partial termination of the trust, Congress implemented a basic precept of traditional trust law. *See Restatement (Third) of Trusts* § 65(1).

In carrying forward with its responsibilities respecting the 1886 lands, the Department of Interior provided documentary evidence of land assignments to assignees. Indian Land Certificates described the tracts of land, certified that the particular individual "and his heirs are entitled to immediate possession of said land, which is to be held in trust, by the Secretary of the Interior, for the exclusive use and benefit of the said Indian, so long as said allottee or his or her heirs occupy and use said land." Pls.' Ex. 35 (Indian Land Certificate of Harry Bluestone (June 1, 1905)). If the land were to be abandoned for a period of time, usually two years, then the land would be reassigned to another beneficiary; any sale, transfer, or encumbrance of the land other than to the United States was void. *Id.* Although not guaranteed by the assignment, in practice an assignee's land would pass directly to his children upon his death, but other relatives needed to follow procedures established by the Bureau of Indian Affairs to receive an assignment. *See* Pls.' Ex. 34 at 2, 22 (*Smith v. Bureau of*

Indian Affairs, Indian Probate No. IP TC 389S-81 (1990)).

Evolution of the Three Communities

In 1934, the Indian Reorganization Act changed the federal government's relationships with Indian tribes. Act of June 18, 1934, 48 Stat. 984 (also known as the Wheeler-Howard Act) (codified at 25 U.S.C. §§ 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479). Primarily, this Act was designed to permit Native Americans to form federally-recognized tribes and to transfer the functions of the Department of Interior and the Office of Indian Affairs regarding reservations to the tribes. *See Indian Reorganization Act: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs,* 73d Cong. 1 (1934). Pursuant to the Act, the Mdewakanton and others formed three communities: the Shakopee Mdewakanton Sioux Community, the Prairie Island Indian Community, and the Lower Sioux Indian Community. *See, e.g.,* Shakopee and Prairie Island *Amici* Br. Ex. A. (Constitution & Bylaws of Prairie Island Indian Community). The communities were and are not exclusively comprised of descendants of loyal Mdewakanton, nor were nor are all descendants members of one of the communities. *See* Pls.' Ex. 30, at 2 (Letter for the Field Solicitor to the Minneapolis Area Dir. of the Bureau of Indian Affairs (Nov. 8, 1978)).

In theory, the Indian Reorganization Act should not have affected the rights of the lineal descendants of the loyal Mdewakanton because it established that "[t]he existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress." 25 U.S.C. § 462. However, a memorandum dated January 25, 1955 from the Minneapolis Area Office of the Bureau of Indian Affairs listed regulations for the issuance of such assignments that gave some effect to the Indian Reorganization Act. If an individual wanted to apply for an assignment of land, he or she first had to file an application with the Indian Community Council of the community with jurisdiction over the land. Pls.' Ex. 25 (1955 Minneapolis Area Office Indian Affairs Manual, Supp. No. 11). Next, the community would forward the application to the Superintendent with recommendations about the action to be taken. The Superintendent would ensure that the applicant was an eligible beneficiary of the loyal Mdewakanton land. *Id.* Upon approval, the Superintendent would forward it to the Area Director for assignment. The solicitation of recommendations by the local communities was "a courtesy only and [was] by no means a legal necessity, since the communities have no decision making authority concerning use of these lands." Pls.' Ex. 30, at 2 (Letter for the Field Solicitor to the Minneapolis Area Dir. of the Bureau of Indian Affairs (Nov. 8, 1978)).

Over time, the communities acquired lands in addition to the 1886 lands. This additional land was interspersed among the 1886 lands, resulting in a "checkerboard pattern." H.R.Rep. No. 96-1409, at 6 (1980). The additional land was not subject to the assignment process that applied to the 1886 lands, which were available only to lineal descendants of the loyal Mdewakanton. S.Rep. No. 96-1047, at 2 (1980). If no eligible Mdewakanton took an assignment, the Secretary of Interior could lease the land for fair market value, with the proceeds from the lands deposited by the Department of Interior in accounts held for the benefit of the lineal descendants. *See* Pls.' Ex. 29, at 5-6 (Memorandum to Comm'r of Indian Affairs from Acting Assoc. Solicitor, Indian Affairs (March 19, 1974)); Hr'g Tr. 105-06.[8] Thus, the trust principal came to consist of land, appurtenances to land, and monies, all deposited for the benefit of the lineal descendants.

Membership in the communities also gave rise to significant issues. Over the years, the communities gained a great deal of discretion in determining who kept or attained membership. *See* Pls.' Ex. 29, at 3 n.2 (Memorandum to Commissioner of Indian Affairs from Acting Associate Solicitor, Indian Affairs (March 19, 1974)) ("The persons comprising the membership

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[8] The March 1974 Memorandum explicated in considerable detail the origins of the trust in the Appropriation Acts of 1888, 1889, and 1890, and the ensuing responsibilities of the Secretary of Interior as trustee.

in those organizations[, *i.e.*, the communities] are not all Mdewakanton."). Because the Department of Interior recognized the importance of the communities' right to self-government and the right to determine their own membership, a lineal descendant of a loyal Mdewakanton might be denied admission to, or removed from, membership in a community even if the descendant lived on 1886 land encompassed by the community boundary. Pls.' Ex. 33, at 2 (Letter from Bureau of Indian Affairs, Midwest Reg'l Office to Anonymous Mdewakanton (Aug. 20, 2001)).

Prior to the 1980 Act, the Department of Interior consistently treated the 1886 lands as being held in trust for the exclusive benefit of the loyal Mdewakanton and their descendants. The language in Land Certificates for the 1886 lands noted that such land "is to be held in trust, by the Secretary of the Interior, for the exclusive use and benefit of the said Indian." Pls.' Ex. 35 (Indian Land Certificate of Harry Bluestone) (June 1, 1905). This treatment continued in 1978, when a Field Solicitor stressed that "none of the three Community governments, organized under the Indian Reorganization Act and operating under constitutions and bylaws, has any right, title or interest in these lands. The land is held for the benefit of a specific class of people and their descendants." Pls.' Ex. 30, at 1-2 (Letter for the Field Solicitor to the Minneapolis Area Dir. of the Bureau of Indian Affairs (Nov. 8, 1978)).

The 1980 Act

By 1980, the communities sought greater control over the use of the lands. The constitution and bylaws for each of the communities had established two classes of members: (1) "all members of the community who were entitled to the benefits of the tribal lands acquired under the Reorganization Act and [2] members who were descendants of the 1886 Mdewakanton and who had exclusive rights to the benefits of the 1886 lands." H.R.Rep. No. 96-1409, at 2 (1980). A legislative proposal was made to Congress to eliminate this distinction and to confer greater control on the communities. The proposal was introduced in the House as H.R. 7147 by Rep. Richard Nolan of Minnesota on April 23, 1980 and was referred to the House Committee on Interior and Insular Affairs. *See* 126 Cong. Rec. 8864 (1980). The bill addressed the 1886 lands specifically and would have conveyed the United States' interest in those lands to the United States in trust for the three communities. *See* 126 Cong. Rec. 29785-86 (1980). The Department of Interior issued a favorable report to the House Committee on the bill, making only one suggestion about language. The Department requested that the bill include a generic description of the 1886 lands and that publication of a legal description of the lands involved be subsequently made in the *Federal Register.* That suggestion was made "to avoid the need to include in the bill a detailed land description that is both cumbersome and subject to inadvertent error." H.R.Rep. No. 96-1409, at 6 (Letter from Thomas W.

Frederick, Assistant Sec'y of Interior, to Hon. Morris K. Udall (Sept. 9, 1980)). The Congressional Budget Office advised that the bill made a "technical change in the status" of the lands and "that no additional cost to the government would be incurred as a result of enactment of th[e] legislation." *Id.* at 3 (Letter from Alice M. Rivlin, Dir. of Cong. Budget Office, to Hon. Morris K. Udall (Sept. 11 1980)). Upon consideration by the House Committee on Interior and Insular Affairs, H.R. 7147 was amended to include a 40 acre tract that had been inadvertently omitted and a requirement that the Secretary of Interior publish a description of the lands in the *Federal Register*. H.R. 7147 then was reported favorably out of Committee by voice vote on September 26, 1980. H.R.Rep. No. 96-1409, at 2. In its report, the Committee found that the "distinction [in membership of the communities] has severely hampered the tribal efforts to achieve self-determination." *Id.* H.R. 7147, as amended by the Committee, was passed by the House on the consent calendar on November 17, 1980, without recorded or voice vote. *See* 126 Cong. Rec. 29, 785-86 (1980).

There was no comparable bill in the Senate. When the Senate received H.R. 7147 on Nov. 19, 1980, it was referred to the Senate Select Committee on Indian Affairs. S.Rep. No. 96-1047, at 2-3 (1980). This Committee reported the bill favorably by a unanimous poll of its members. *Id.* at 3. The Senate Report noted that the 1886 lands had been "acquired by the United States for the use and benefit" of the loyal Mdewakanton, but that under the proposed bill

"all right, title, and interest in such lands would be declared instead to be held by the United States in trust for three Minnesota Sioux tribal Communities." *Id.* at 1. A stated reason for the bill was that the land assignments made to the descendants "are not encumberable documents that can be used in securing loans from commercial institutions." *Id.* at 6. H.R. 7147 was passed by the Senate on December 8, 1980, by unanimous consent. *See* 126 Cong. Rec. 32,898 (1980).

Thus, H.R. 7147 was passed by Congress during a lame-duck session held after the November 1980 elections. President Carter signed the bill into law on December 19, 1980, very near the close of his presidency. The full statutory text of the Act is as follows:

An Act

To provide that certain land of the United States shall be held by the United States in trust for certain communities of the Mdewakanton Sioux in Minnesota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); the Act of March 2, 1889 (25 Stat.

980); and the Act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter be held by the United States –

(1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

(2) with respect to the some 572.5 acres of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota; and

(3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust for the Prairie Island Indian Community of Minnesota.

SEC. 2. The Secretary of the Interior shall cause a notice to be published in the Federal Register describing the lands transferred by section 1 of this Act. The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.

SEC. 3. Nothing in this Act shall (1) alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

Pub.L. No. 96-557, 94 Stat. 3262 (1980).

The 1980 Act, read literally, transferred whatever title the United States had in the 1886 lands from the United States to the United States in trust for the three communities. The 1980 Act failed to address what title the United States had in the 1886 lands. The Act also was silent as to the beneficial interest of the loyal Mdewakanton and their lineal descendants except that a savings clause preserved the rights of existing assignees. *Id.* § 3. In short, the 1980 Act addressed the trust relationship in existence regarding the 1886 lands only in a backhanded minor way through the limited savings clause. The 1980 Act also was silent as to the 1886 monies held by the Department of Interior for the benefit of the lineal descendants.

The extraordinarily poor drafting reflected in the 1980 Act did not slow its implementation by the Department of Interior. In a letter from the Acting Area Director of the Bureau of Indian Affairs dated January 15, 1981 to the Chairman, Community Council, Lower Sioux Community, the Department of Interior took the position that the 1886 lands and 1886 monies held by Interior would be treated as "tribally-owned" property, *i.e.*, it would now be controlled by the Community without reference to the 1886 restriction. Lower Sioux *Amicus* Br.App. 3. (Letter from David Granum to Leon Columbus (Jan. 15, 1981)). This interpretation was confirmed by a letter from the Field Solicitor to the Area Director dated February 6, 1981. Lower Sioux *Amicus* Br.App.

4 (Letter from Elmer T. Nitzschke to Edwin Demery (Feb. 6, 1981)). The Field Solicitor's letter addresses four topics of importance to the Department in implementing the 1980 Act: (1) the steps needed to transfer title to the 1886 lands, (2) the effect of the savings clause to the 1980 Act, (3) the disposition of 1886 monies, and (4) the desirability of preparing an inventory of the 1886 lands, monies, and other property being transferred.

As to title, the Field Solicitor indicated that transfer could not be effectuated until notice had been published in the *Federal Register*:

> Section 2 of this Public Law requires that a Notice be published in the Federal Register describing the lands transferred to the respective communities: Has such publication taken [p]lace[?] *[W]hile the transfer of title was effectuated by the passage of the Act, the incorporation of the lands in question within the bounds of the respective reservation may not legally be completed until such time as the required publication has been effectuated.*

Id. at 1 (emphasis added).[9]

Respecting the effect of the savings clause, the Field Solicitor advised that existing assignments had to be honored:

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[9] A notice was published in the *Federal Register* on August 5, 1982. *See* 47 Fed.Reg. 34,050.

> [U]ntil such time as the interests described in the outstanding leases or assignments to the lands have expired or been terminated, the respective communities do not have a full proprietorial interest in those lands. When those lands are effectively incorporated within the jurisdiction or reservation of the respective communities by the aforementioned publication in the Federal Register, the communities will have full governmental or legislative jurisdiction over such land comparable to their jurisdiction over other lands of the reservation.

Id. at 2.

The Field Solicitor assumed that the 1980 law applied to the 1886 monies held by the Bureau of Indian Affairs for the benefit of the lineal descendants and that the 1886 monies could be turned over to the communities without notice to the 1886 beneficiaries:

> One further matter for consideration is the accumulated revenues currently held by the Bureau identifiable to the lands in question. It is my understanding that the apportioned share belonging to or identified for the Shakoppee [*sic*] Community has already been turned over to that group. Similar action should be taken as to the other two communities claiming an interest in these monies. As to how the respective communities can utilize these funds, it is interesting to note, as pointed out in the Secretary's letter to OMB that the cost of acquiring the

> land in question was offset against the recovery by the Mdewakanton and Wahpakoot [*sic*] Bands of Souix [*sic*] Indians against the United States (57 Court of Claims 357 (1932)) [*sic*] the beneficiaries of which included many individuals other than those for whom such land was held by the United States. In light of this bit of information it may be that tribal use of these impounded funds may include other than those persons previously identified as eligible Mdewakantons for purposes of occupying the land in question.

Id.

Lastly, the Field Solicitor recommended that an inventory of the 1886 property be made in connection with transfer of the property to the communities:

> It would be my suggestion that in preparation for meeting with the various communities on this legislation that the Bureau inventory all of the outstanding interests as to the lands transferred and be prepared to discuss them with each of the communities. Revenues from these lands produced after the effective transfer of title will be available to the tribe for tribal use as are the revenues from other acquired lands belonging to the Community.

Id. The materials made available to the court do not show that any such inventory was made.

To implement the 1980 Act, title to the 1886 lands, monies, and other property was transferred to the communities. Subsequent decisions by the Department of Interior have uniformly given effect to the ensuing transfer of title to the 1886 property, rejecting claims by lineal descendants of the loyal Mdewakanton. As Administrative Law Judge Amess stated in *Brewer v. Acting Deputy Assistant Sec'y for Indian Affairs,* 10 IBIA 110, at *16 (1982), prior to the Act, the United States held title for the benefit of the loyal Mdewakanton and their descendants, but "[w]ith passage of the Act of Dec. 19, 1980, title was held in trust for the community to be managed by it for the benefit of the community and its members." *See also Gitchel v. Minneapolis Area Dir.,* 28 IBIA 46, 48 (1995) ("there is simply no question as to the intent of Congress in 1980 to convey the beneficial title to these lands to the Community"); *cf. Cermak v. Norton,* 322 F.Supp.2d 1009, 1015 (D.Minn.2004) (holding that the Acting Area Director's decision not to reissue land certificates to heirs was not arbitrary and capricious).

Since 1980, the laws and regulations concerning Indian gambling have changed, making operation of gaming venues on community land feasible and lucrative. Operation of casinos, hotels, entertainment centers, and other developments, rather than agriculture, has generated very high income for one of the communities. Am. Compl. ¶ 33. Subsequently, the Shakopee Mdewakanton Sioux (Dakota) Community reportedly has purchased "thousands of acres of

suburban land" in the Minneapolis-St. Paul metropolitan area. Hr'g Tr. at 90. The lineal descendants have been shut out from this largesse to the extent that they have not been members of the favored community.

This Lawsuit

The four originally named plaintiffs claimed to sue "on behalf of themselves and all other descendants of persons listed on the May 20, 1886 U.S. Mdewakanton census." Am. Compl. ¶ 2. The Complaint alleges that the properties purchased with funds appropriated by the 1888, 1889, and 1890 Acts constituted the corpus of a trust, with legal title in the United States, but with equitable title in the loyal Mdewakanton and their lineal descendants. They aver that the United States breached its fiduciary duty in 1980 and thereafter by transferring trust assets and permitting non-descendants to receive profits from the casinos and other property on the lands in question. *Id.* ¶¶ 35-41. Secondarily, the plaintiffs allege that a contract was created between the loyal Mdewakanton and the United States through which the Mdewakanton renounced their tribal affiliation in exchange for the appropriated trust property and that the government breached this contract. *Id.* ¶¶ 50-55.

After plaintiffs filed their amended complaint, the government responded with a motion to dismiss, which makes three principal arguments. First, the government argues that the court has no jurisdiction

to hear this case under the Tucker Act, 28 U.S.C. § 1491(a)(1), or Indian Tucker Act, 28 U.S.C. § 1505, because the government had no money-mandating fiduciary duty. As the government would have it, no trust existed prior to 1980, and, even if one did, the 1980 Act transferred equitable title in the 1886 lands to the communities from the lineal descendants. Def.'s Mot. to Dismiss at 12-13. The government also argues that the loyal Mdewakanton and their lineal descendants are not an "identifiable group of American Indians" under the Indian Tucker Act. *Id.* at 12. Second, it denies that the United States has a contractual duty to plaintiffs, and argues that the contract claim is insufficient in detail and should be dismissed under Rule 9(h)(3) of the Rules of the Court of Federal Claims ("RCFC"). *Id.* at 22. Third, it asserts that the six-year statute of limitations has expired because any breach of contract or fiduciary duty took place with the passage of the 1980 Act. *Id.* at 22-23.

The plaintiffs filed a cross-motion for partial summary judgment on three issues: whether the lineal descendants are the trust beneficiaries of the 1886 lands, whether the United States breached its duties as trustee, and whether the United States breached its contractual duties to plaintiffs. *See* Pls.' Cross-Mot. at 1.

Despite the class-action language in the complaint, plaintiffs have neither applied for class certification nor do they apparently intend to do so in the near future. Plaintiffs' counsel has stated that at

least four different groups of plaintiffs are involved even though all plaintiffs claim to be lineal descendants: (1) members of the Shakopee community, (2) members of the Prairie Island community, (3) members of the Lower Sioux community, and (4) lineal descendants who do not belong to any of the communities. Hr'g Tr. at 48-49. For the present, plaintiffs have opted to file a motion to amend their complaint to add plaintiffs rather than to seek class certification. The motion requests leave to amend their complaint to add both additional named and anonymous plaintiffs, and asks that the court enter a protective order establishing filing procedures to protect the confidentiality of the anonymous "John Doe" and "Jane Doe" plaintiffs. In support of the amendment, plaintiffs claim that those who are members of communities fear that their involvement will be seen as action adverse to the communities and that their membership in the communities will be terminated and those lineal descendants among them who are not members of communities fear that the communities will deny their membership applications if their involvement in this case is known. Hr'g Tr. at 88-89.

A hearing on the pending motions was held on June 24, 2004, and, at the court's specific request, supplemental briefs were filed thereafter by the parties on the applicability *vel non* of the "Indian Trust Accounting Statute" that was initially enacted in 1990 as part of the annual appropriations act for the Department of Interior and has been adopted each

year thereafter. *See, e.g., Shoshone Indian Tribe v. United States,* 364 F.3d 1339, 1344 & n. 2 (Fed.Cir.2004). The current version of the Indian Trust Accounting Statute, enacted as part of the Department of the Interior and Related Agencies Appropriations Act, Pub.L. No. 108-108, provides as follows:

> *[N]otwithstanding any other provision of law,* the statute of limitations *shall not commence to run* on any claim, including a claim in litigation pending on the date of the enactment of this Act, concerning *losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting* of such funds from which the beneficiary can determine whether there has been a loss.

Pub.L. No. 108-108, 117 Stat. 1241, 1263 (Nov. 10, 2003) (emphasis added).[10] The parties' supplemental briefing was completed in August. Thereafter, each of the three communities and Mr. Cermak filed their

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[10] The Federal Circuit in *Shoshone* addressed an identical statutory provision enacted as part of the appropriations made for the Department of Interior for 2003. *See* 364 F.3d at 1344 (quoting from Pub.L. No. 108-7). The prior versions were also identical, except, as the Federal Circuit noted, the original version adopted in 1990 did not contain the clause "from which the beneficiary can determine whether there has been a loss," which clause was added in 1991, nor did it incorporate the clause "including any claim in litigation pending on the date of this Act," which clause was added in 1993. *See Shoshone,* 364 F.3d at 1344.

motions for leave to participate as *amicus curiae,* and those motions were briefed.

ANALYSIS

Standards for Decision

Plaintiffs bear the burden of establishing the court's subject matter jurisdiction over the claim. *See McNutt v. General Motors Acceptance Corp. of Ind.,* 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); *Ware v. United States,* 57 Fed.Cl. 782, 784 (2003); *Bond v. United States,* 43 Fed.Cl. 346, 348 (1999). In determining whether it has jurisdiction over a case under RCFC 12(b)(1) or 12(b)(6), a federal court must accept as true the facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiffs. *See Henke v. United States,* 60 F.3d 795, 797 (Fed.Cir.1995) (citing *Scheuer v. Rhodes,* 416 U.S. 232, 236-37, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)). "Fact-finding is proper when considering a motion to dismiss where the jurisdictional facts in the complaint . . . are challenged." *Moyer v. United States,* 190 F.3d 1314, 1318 (Fed.Cir.1999) (citing *Reynolds v. Army and Air Force Exch. Serv.,* 846 F.2d 746, 747 (Fed.Cir.1988)).

Jurisdiction over a claim against the United States requires a waiver of sovereign immunity and the existence of a cause of action that falls within the scope of that waiver. *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003). Such a waiver may not be inferred,

but must be "'unequivocally expressed.'" *United States v. Mitchell,* 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) ("*Mitchell I*") (quoting *United States v. King,* 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969)). The Tucker Act and the Indian Tucker Act both constitute such waivers, but any invocation of jurisdiction under those Acts must be accompanied by a corresponding substantive claim that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States v. Mitchell,* 463 U.S. 206, 217, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) ("*Mitchell II*") (quoting *United States v. Testan,* 424 U.S. 392, 400, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976)).

In assessing a motion to dismiss for failure to state a claim upon which relief can be granted, the court's "'task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *Swierkiewicz v. Sorema,* 534 U.S. 506, 511, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting *Scheuer,* 416 U.S. at 236, 94 S.Ct. 1683). A motion to dismiss under RCFC 12(b)(6) should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

Summary judgment is appropriate when evidentiary materials filed in a case reveal that "there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law." RCFC 56(c). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The party moving for summary judgment bears the initial burden of demonstrating the absence of genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If no rational trier of fact could find for the non-moving party, summary judgment is appropriate. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The court should resolve any doubts in making this determination in favor of the non-moving party. *Id.* at 587-88, 106 S.Ct. 1348.

In addition, "[a]lthough evidence presented by a non-movant in relation to a summary judgment motion need not be admissible at trial, the [c]ourt may not grant summary judgment to a moving party based solely on evidence that arguably may not be addressed and admitted at trial." *Bannum, Inc. v. United States,* 59 Fed.Cl. 241, 244 (2003) (citing *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. 2548; *Conoco, Inc. v. Department of Energy,* 99 F.3d 387, 393-95 (Fed.Cir.1996)). "Since the burden is on the party moving for summary judgment to demonstrate that there is no genuine issue of material fact, the movant also must show that the content of his affidavits would be admissible at trial." 10B Charles Wright, *et al., Federal Practice and Procedure: Civil 3d* § 2738, at 342 (1988).

Amici Curiae

The Shakopee Mdewakanton Sioux Community, the Prairie Island Indian Community, and the Lower Sioux Community have each moved for leave to participate as *amicus curiae,* as has Raymond Cermak, Sr., an individual who claims to be a lineal descendant of loyal Mdewakanton and who previously received trust monies from the government but is not an enrolled member of any of the three communities. Unlike intervention under RCFC 24(a), there is no right to participate as an *amicus curiae;* the decision "is left entirely to the discretion of the court." *Fluor Corp. v. United States,* 35 Fed.Cl. 284, 285 (1996). *See also United States ex rel. Roby v. Boeing Co.,* 73 F.Supp.2d 897, 900 (S.D.Ohio 1999); *American Satellite Co. v. United States,* 22 Cl.Ct. 547, 549 (1991).[11] In exercising this discretion, courts have

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[11] Rule 24(a)(2) permits intervention of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." The Shakopee and Prairie Island Communities state that they opted not to intervene because "this Court does not possess jurisdiction to declare the Tribes as the equitable title holder and trust beneficiary of the lands at issue." Shakopee and Prairie Island Reply at 2-3.

In plaintiffs' opposition to Mr. Cermak's motion for leave to participate as *amicus curiae,* plaintiffs contend that "if Ray Cermak is truly concerned about matters in this case that may affect him, then he can move to intervene as a plaintiff – as long as he can prove he is a lineal descendant of a person on the May

(Continued on following page)

considered such factors as: whether the parties oppose the motion, the strength of information and argument presented by the potential *amicus curiae's* interests, the partisanship of the moving entity, the adequacy of the current representation, the timeliness of the motion, and, perhaps most importantly, the usefulness of information and argument presented by the potential *amicus curiae* to the court. *Fluor,* 35 Fed.Cl. at 285; *American Satellite,* 22 Cl.Ct. at 549.

Several of these factors weigh in favor of granting leave. The communities' interests are strong in this case. Unlike in *American Satellite,* where the moving entity was similarly situated to the plaintiff and anticipated filing its own suit, the communities have an interest in this court's interpretation of the 1980 Act because they treat the land and other property addressed by that Act as inhering in them as of right. Shakopee and Prairie Island Mot. at 1-2. *See American Satellite,* 22 Cl.Ct. at 548. In addition, the communities' briefs may well be useful to the court. When *amici* have "specialized knowledge which may be beneficial to the court in the resolution" of the case, granting a motion for leave is usually appropriate. *See Hage v. United States,* 35 Fed.Cl. 737, 742 (1996). Here, the communities have detailed

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20, 1886 Minnesota Mdewakanton census." Pls.' Opp. to Mot. of Raymond Cermak at 2 (footnote omitted). Nonetheless, Mr. Cermak has chosen not to seek to intervene at this stage of the proceeding.

experience with the more recent events constituting part of the complex history involved in this case, and Mr. Cermak claims detailed experience with the pre-1980 regime under which the Department of Interior administered the 1886 lands and monies. Both the communities' perspectives and that of Mr. Cermak may assist the court in gathering a more fully balanced set of views on the disputed issues.

Some of the factors mitigate against granting leave to file. The communities are partisan in this case. Unlike appellate courts, trial courts "have frowned on participation which simply allows the amicus to litigate its own views." *American Satellite,* 22 Cl.Ct. at 549. The Shakopee and Prairie Island Communities also readily admit their support of the position of the United States, albeit from a quite different perspective. Shakopee and Prairie Island Reply at 2. The government has adequately represented the communities' interests and presumably will continue to do so. Trial courts are more likely to grant leave when they are "concerned that one of the parties is not interested in or capable of fully presenting one side of the argument." *Fluor,* 35 Fed.Cl. at 286 (quoting *American Satellite,* 22 Cl.Ct. at 549). The communities disagree with the United States' litigation strategy, but that concern may not be of importance in the resolution of the case. Shakopee and Prairie Island Reply at 4-5; *American Satellite,* 22 Cl.Ct. at 549. Again, by contrast, Mr. Cermak's posture more nearly fits with that of the plaintiffs

although his approach hardly matches the plaintiffs' arguments.

Timeliness also is a concern, but appears not to be an insurmountable obstacle to participation. The motions for leave were filed by the communities on August 31, 2004, after all briefing had been completed on the pending motion and cross-motion, including the supplemental briefing that occurred following the hearing on those motions. Mr. Cermak's motion was not filed until October 5, 2004. Nonetheless, the ensuing delay has amounted to no more than several months.

Several factors are neutral, or nearly so. Plaintiffs oppose the filing of *amicus curiae* briefs, while the government has not filed a brief on the subject. Plaintiffs aver that the "United States has expressed indifference" to the communities' motions, Pls.' Resp. to Mot. for Leave at 4, while the communities assert that the government "welcomes the Tribes as *amicus curiae*." Shakopee and Prairie Island Reply at 1.

On balance, the court will grant the communities' motions for leave, along with Mr. Cermak's motion. The communities' and Mr. Cermak's perspectives may be potentially useful. This consideration outweighs the opposition by plaintiffs and the communities' partisanship in approaching the issues. The Lower Sioux Community's motion for leave to file a memorandum as *amicus curiae* is granted. The Shakopee Mdewakanton Sioux Community, the Prairie Island Indian Community, and Mr. Cermak each moved to

participate as *amicus curiae* without specifying the scope of their request. Their motions are granted, limited to the filing of briefs. For the communities and Mr. Cermak to participate in any manner extending beyond the filing of the proffered briefs, they must file motions explaining the specific benefits to the court of their proposed additional contribution to the proceedings in this case.

Standing

In their *amicus* brief, the Prairie Island and Shakopee Communities challenge the plaintiffs' standing to present their claims. *See* Shakopee and Prairie Island *Amici* Br. at 5-7. For plaintiffs to have standing under the Constitution, they must satisfy three requirements. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). First, plaintiffs must suffer "injury in fact" – an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent. *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130. Second, the injury must be "'fairly . . . traceable to the challenged action of the defendant.'" *Id.* at 560-61, 112 S.Ct. 2130 (quoting *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 41-42, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)). Third, a favorable decision for the plaintiff must be likely to redress the injury. *Id.* at 561, 112 S.Ct. 2130. Plaintiffs' case satisfies each of these elements. The plaintiffs allege that they have suffered a concrete

and actual injury in fact – financial harm. Am. Compl. ¶¶ 42, 56. Moreover, this financial harm was allegedly caused by the defendant's breach of its fiduciary and contractual duties, and awarding the plaintiffs damages is likely to redress that harm by restoring their financial position, at least in part. *Id.*

Amici make three principal arguments, each of which fails to undermine plaintiffs' claim to standing. First, they argue that because plaintiffs are asserting group rights, they must represent the entire group. Because the plaintiffs have advised that, for the present, they will not seek class certification, *amici* assert that they do not represent the entire group of lineal descendants. Shakopee and Prairie Island Br. at 6. *Amici* rely on *Cherokee Nation v. United States,* 92 Ct.Cl. 262, 1940 WL 4122 (1940), in which the court dismissed a claim because the entire Cherokee tribe did not participate. However, the statute granting jurisdiction to this court's predecessor in *Cherokee Nation* explicitly required that the entire tribe bring suit. The court held that "the legislation authorizing an action to be brought by the tribe by its express terms permits only a suit by the tribe for the recovery of a judgment, if it is entitled to one, for the benefit of the whole tribe and not for certain individuals as members of the tribe." *Id.* at 268. "In other words, the jurisdictional act authorizes only the making and the adjudication of tribal claims." *Id.* at 268-69. In contrast, the loyal Mdewakanton, to qualify as beneficiaries of the 1888, 1889, and 1890 Acts, expressly had to abjure their relationship to *any* tribe; they

were obligated to sever their tribal relations. *See, e.g.*, Act of June 29, 1888; 25 Stat. 217, 228 (providing support for those full-blooded Mdewakanton who have resided in Minnesota since May 20, 1886 "and [have] severed their tribal relations"); Pls.' Ex. 30, at 1 (stating in a Letter from Mariana Shulstad for the Field Solicitor to Edwin Demery, Area Director, Bureau of Indian Affairs (Nov. 8, 1978), that the 1886 lands were purchased for the "benefit of those Mdewakanton Sioux individuals who had severed relations with their tribe"). Also, in this case jurisdiction is not grounded in a limited waiver by Congress, unlike in *Cherokee Nation* or in the *Sisseton* and *Medawakanton* annuity cases. Instead, jurisdiction is premised upon the more general waivers of sovereign immunity found in the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505.

Second, *amici* challenge the "injury in fact" suffered by those lineal descendants who also belong to one of the communities. According to this argument, these plaintiffs "are already eligible to share in the lands under the inherent and [c]onstitutional authority exercised by each [t]ribal government." Shakopee and Prairie Island Br. at 6. This eligibility supposedly bars such plaintiffs from suffering any injury. However, this argument improperly belittles plaintiffs' claims: the benefits some plaintiffs receive as members of one of the communities may be substantially less than, or different from, those which they would receive as a lineal descendant. *See, e.g.*, Pls.' Resp. to Mot. for Leave at 21. Although the court

has not made any factual findings regarding the veracity of *amici's* contention, plaintiffs' allegations of financial and other harm are sufficient to provide standing. *See Lujan,* 504 U.S. at 561, 112 S.Ct. 2130 (quoting *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990) ("on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'")).

Third, the *amici* claim that the plaintiffs who belong to the communities have no redressable claim because they have not severed tribal relations and because the communities do not permit dual enrollment. Shakopee and Prairie Island Br. at 6-7. This argument is sophistic and pulls historical circumstances out of context. To be a beneficiary of the 1888, 1889, and 1890 Acts, a Mdewakanton must have severed tribal relations. *See, e.g.,* Act of June 29, 1888, 25 Stat. at 228; Pls.' Ex. 30, at 1. This requirement applied to the original trust beneficiaries. It reaches through time to the present day only for limited purposes, *viz.,* it was the principle governing eligibility for inclusion in the 1886 census, and it now defines the group of individual persons eligible to bring a claim. Moreover, the communities' prohibitions on dual enrollment do not affect the lineal descendants because their alleged status as a beneficiary of a trust does not constitute a separate enrollment.

In short, each of the arguments of *amici* directed against plaintiffs' standing to bring their claims lacks

merit and is unavailing. Plaintiffs have standing to pursue their claims.

Jurisdiction

A. Statutory Predicates for Suit

The government challenges the court's jurisdiction, arguing that the plaintiffs' claims fall outside the jurisdictional grants of the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505. As explained above, the United States must waive sovereign immunity to be bound by damage judgments, and such waiver must be explicit. *See supra*, at 535. Both Acts apply and provide the requisite waiver of sovereign immunity. The Tucker Act grants this court jurisdiction over claims "against the United States founded . . . [on] any Act of Congress or any regulation of an executive department . . . or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). Plaintiffs' first claim is founded on an action for damages not sounding in tort, namely, breach of fiduciary duty, and their second claim alleges breach of a contract with the government.[12] The Tucker Act itself does not provide the substantive law to be applied; rather, trust and contract law supply that framework. *See*

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[12] The government also contends that the alleged breach of fiduciary duty is not a "money-mandating duty" under *Mitchell I*, *Mitchell II*, and *White Mountain Apache*. This contention is addressed below.

Confederated Tribes of Warm Springs Reservation of Oregon v. United States, 248 F.3d 1365, 1371 (Fed.Cir.2001). Because the Tucker Act "'itself provides the necessary consent' to suit . . . the rights-creating statute or regulation need not contain 'a second waiver of sovereign immunity.'" *United States v. Navajo Nation,* 537 U.S. 488, 503, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003) (quoting *Mitchell II,* 463 U.S. at 218-19, 103 S.Ct. 2961).

The Indian Tucker Act also provides a basis for this court's jurisdiction over the claims in this case. 28 U.S.C. § 1505 grants jurisdiction over "any claim" brought by

> *any* tribe, band, or other *identifiable group of American Indians* residing within the territorial limits of the United States or Alaska *whenever such claim is one arising under the Constitution, laws or treaties of the United States,* or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band, or group.

(Emphasis added.)

The government asserts that the lineal descendants of the loyal Mdewakanton do not have a right to sue under the Indian Tucker Act because they "are individual Indians and not a tribal group." Def.'s Mot. to Dismiss at 12. Congress was able to identify the loyal Mdewakanton and their lineal descendants in the Acts of 1888, 1889, 1890, and 1901. Moreover,

plaintiffs need not be an organized unit to claim jurisdiction under the Indian Tucker Act. *See Tee-Hit-Ton Indians v. United States,* 128 Ct.Cl. 82, 120 F.Supp. 202, 204 (1954) (holding that the descendants of the earliest known native inhabitants of an area of land in southeastern Alaska satisfied the "identifiable group" requirement). In addition, the alleged divestiture of rights occurring after the 1980 Act does not elide any jurisdiction that would arise under the Indian Tucker Act. *See Menominee Tribe v. United States,* 179 Ct.Cl. 496, 388 F.2d 998, 1001 (1967) (holding that despite the Menominee Termination Act, which terminated federal supervision over the tribe's property, the Menominee Tribe still could invoke jurisdiction under the Indian Tucker Act, in part because "[t]he tribe continues to hold the beneficial and equitable interest in the property").

Correlatively, the government argues that individual Indians are not permitted to bring *personal* claims under 28 U.S.C. § 1505. *See Fields v. United States,* 191 Ct.Cl. 191, 423 F.2d 380, 383 (1970) (holding that the alleged heirs of an individual plaintiff could not invoke jurisdiction under the Indian Tucker Act, but could bring claims under the Tucker Act); *Cherokee Freedmen v. United States,* 161 Ct.Cl. 787, 1963 WL 8556 (1963) (holding, on an appeal from the Indian Claims Commission, that claims by Cherokee Freedmen that the Dawes Commission should have enrolled them as members of the Cherokee Nation were correctly dismissed as individual and not group claims). This challenge also

fails, however, because plaintiffs bring their claims specifically and solely as members of a group. Unlike in *Cherokee Freedmen*, where the plaintiffs' case consisted of "individual claims dependent upon the individual facts and circumstances pertinent to the particular person asserting that he (or his ancestor) was wrongfully denied enrollment," 161 Ct.Cl. at 789, this case involves questions of a particular and discrete group's rights under various Acts of Congress. Whereas in *Cherokee Freedmen* "[t]here [was] no common right or group interest," *id.*, the lineal descendants of the loyal Mdewakanton have a collective interest in ascertaining whether the government had a fiduciary duty to them and whether that fiduciary duty has been violated or abridged. The lineal descendants are unable to sue as a tribe because they necessarily had to sever their tribal relations prior to 1886 to qualify as beneficiaries of the 1888, 1889, and 1890 Acts, but they were and still remain an identifiable group of American Indians.

Moreover, the fact that this case is not currently certified as a class action does not change the court's adjudication of questions common to the entire group. The court must determine whether the group (comprised of numerous individuals) is the beneficiary of a trust, whether the group has contracted with the United States government, and what if any rights the group has under such trust or contract. Thus, in this case the scope of the inquiry into group rights far exceeds that in *Fields* and *Cherokee Freedmen*. It is much more analogous to the situation in *Tee-Hit-Ton*,

where the court concluded that "some, at least, of the land exploited by the Tee-[H]it-[T]on was claimed by the plaintiff clan as a whole, and that it is, therefore, an identifiable group of Indians within the meaning of the statute." 120 F.Supp. at 204. Because determinations comparable to those in *Tee-Hit-Ton* are necessarily implicated by the claims in this case, jurisdiction is appropriate under the Indian Tucker Act.

B. Nature of Plaintiffs' Claims

1. Breach of fiduciary duty.

The plaintiffs allege that the 1886 property constituted the principal of a trust, with legal title in the United States, but with equitable title in the loyal Mdewakanton and their lineal descendants. The government allegedly breached its fiduciary duty in 1980 and thereafter by transferring control of trust assets to the communities and permitting non-descendants to receive profits from casinos and other ventures on the lands in question. Am. Com pl. ¶¶ 35-41. The government challenges this claim in three principal ways. First, it argues that the 1886 lands were never held in trust for the loyal Mdewakanton, and that the United States always held both legal and equitable title to the land. Def.'s Mot. to Dismiss at 16-20. The Acts of 1888, 1889, and 1890, according to this argument, extended benefits to those who satisfied the requirements of the Acts, but not to their lineal descendants. *Id.* at 19. Second, the government

interprets the 1980 Act as extinguishing any fiduciary duty the government owed to the lineal descendants. *Id.* at 13-16. Third, it contends that any duty the government still owes to the lineal descendants is not a money-mandating duty, and therefore the court lacks jurisdiction. *Id.* at 12-22. Each of these arguments is examined in turn.

(a) *Existence of a trust.*

Contrary to the government's assertions, the arrangement between the loyal Mdewakanton and the government includes all of the features of a trust. "Where . . . the relevant sources of substantive law create '[a]ll of the necessary elements of a common-law trust,' there is no need to look elsewhere for the source of a trust relationship." *White Mountain Apache,* 537 U.S. at 476 n. 3, 123 S.Ct. 1126. The three traditional elements of a trust are a trustee, beneficiaries, and trust property, also known as the corpus. *See Restatement (Third) of Trusts* § 2 cmt. f. The trustee manages the corpus in the best interests of the beneficiaries in accordance with the guidelines for and purposes of the trust. *Id.* In this case, the United States created a trust in which it acted as trustee, the loyal Mdewakanton and their lineal descendants were, and arguably are, the beneficiaries, and the corpus includes property, improvements to property, and money.

The 1888, 1889, and 1890 Acts in combination have three key features that show the creation of a

trust. First, the 1888 Act calls upon the Secretary of Interior to expend the appropriated funds for the Mdewakanton "as in his judgment he may deem best." Act of 1888, 25 Stat. at 228-29. Similar provisions were included in the 1889 and 1890 Acts. *See* Act of 1889, 25 Stat. at 992-93 (calling for the money to be expended by the Secretary of Interior "as may be deemed best in the case of each of these Indians or family thereof"); Act of 1890, 26 Stat. at 349 ("as in his judgment he may think best"). This language functionally appoints the Secretary of Interior to serve as the trustee to spend the funds on behalf of the beneficiaries, the loyal Mdewakanton. Second, the Acts of 1889 and 1890 call for "each of the Indians in this paragraph [to receive] as nearly as practicable, an equal amount in value of this appropriation and that made by [the 1888 Act]." *See* Act of 1889, 25 Stat. at 992-93. This provision operates as a guideline for the trustee: he or she must ensure that the corpus is distributed equally to the extent possible. Third, in order to ensure that the proceeds from the 1889 and 1890 appropriations went to the beneficiaries, Congress inserted an additional clause providing that if the funds were not all spent during the fiscal year, they "shall, notwithstanding, be used and expended for the purposes for which the same amount was appropriated and for the benefit of the above-named Indians." Act of 1889, 25 Stat. at 992. This clause aids in defining the corpus of the trust by directing that all of the funds allocated be used for the benefit of the loyal Mdewakanton, even if basic necessities had already been provided for them.

An analysis of the history behind Congress's enacted laws also reveals the creation of a trust. During debate on the 1888 Act, Rep. MacDonald referred to the Mdewakanton as "beneficiaries" of the 1888 Act. 19 Cong. Rec. H2977 (daily ed. Apr. 14, 1888) (statement of Rep. MacDonald). "The actual purchase of land under these appropriations began in April, 1889." *History of the Santee* at 282. As the purchases progressed, Congress seems to have kept watch over the results because the 1890 Appropriations Act specified that $2,000 of the $8,000 that was appropriated was designated to be expended for the Prairie Island settlement. *Id.* In addition, the property buyer, Robert B. Henton, observed that several prior purchases that had been deeded directly to the loyal Mdewakanton, *see supra*, at 528 n. 7, had been sold or mortgaged. *History of the Santee* at 283. Accordingly, Mr. Henton considered that title to future purchases should be retained by the government, and that policy was followed thereafter. *Id.*

The 1901 Act by Congress further reflected Congress's understanding that the 1886 lands were held in trust for the Mdewakanton. In connection with passage of that Act, Senator Pettigrew commented that "[t]he land was purchased for their benefit, and the title is in them subject to a provision by which they can not convey it." 34 Cong. Rec. 2523 (1901). This statement reflects an explicit understanding that the loyal Mdewakanton had equitable title to the 1886 property as beneficiaries. The 1901 Act empowered the Secretary of the Interior to sell certain land

provided "the written consent of the adult Indians residing in Redwood County, Minnesota, shall first be given." Act of 1901, 31 Stat. at 805, 806. A basic precept of trust law is that partial termination of a trust requires the consent of all the beneficiaries. *See Restatement (Third) of Trusts* § 65(1) ("if all of the beneficiaries of an irrevocable trust consent, they can compel the termination or modification of the trust").

The Department of Interior's practice in addressing the 1886 lands and other property has also been consistent with the formation of a trust. The Land Certificates that assigned 1886 land to individuals expressly stated that the land "is to be *held in trust, by the Secretary of the Interior,* for the exclusive use and benefit of the said Indian." *See* Pls.' Ex. 35 (emphasis added). A March 1974 Memorandum from the Acting Associate Solicitor for Indian Affairs to the Commissioner of Indian Affairs concluded that "[t]he lands *are held in trust by the United States* with the Secretary possessing a special power of appointment among members of a definite class." Pls.' Ex. 29, at 5 (emphasis added). An additional letter written in 1978 for the Field Solicitor to the Minneapolis Area Director of the Bureau of Indian Affairs emphasized that "none of the three Community governments, organized under the Indian Reorganization Act and operating under constitutions and bylaws, has any right, title, or interest in these lands. *The land is held for the benefit of a specific class of people and their descendants.*" Pls.' Ex. 30, at 1-2 (emphasis added). These memoranda only scratch the surface of the

numerous documents that plaintiffs have provided to the court that reflect the Department of Interior's pre-1980 interpretation of the 1888, 1889, and 1890 Acts, namely, that the United States held the 1886 lands in trust for the loyal Mdewakanton and their lineal descendants. The court has not been provided with any evidence to the contrary. Thus, the court necessarily concludes that there is no genuine dispute of material fact that a trust was created and that the government held the 1886 lands, the 1886 monies, and the other 1886 property in trust.

The government challenges the plaintiffs' contention that the lineal descendants are beneficiaries of the trust, claiming that the land was purchased only for the Mdewakanton who satisfied the conditions of the 1888, 1889, and 1890 Acts, and that their descendants are not beneficiaries of any trust. Def.'s Mot. to Dismiss at 19. However, the language of the Acts themselves and the consistent, lengthy administration by the Department of Interior of the 1886 lands, monies, and other property support the plaintiffs' view that the lineal descendants are beneficiaries. The 1863 Act, which first attempted to provide for the loyal Mdewakanton, sought to provide land that would serve as "an inheritance to said Indians *and their heirs* forever." 12 Stat. at 654 (emphasis added). The 1888 Act was motivated in part by the fact that the 1863 Act was not successfully implemented. 19 Cong. Rec. H2976-77 (daily ed. Apr. 14, 1888) (statement of Rep. MacDonald). The 1889 and 1890 Acts also called upon the Secretary of

Interior to expend the money on behalf of the "Indians *or family thereof.*" Act of 1889, 25 Stat. at 992 (emphasis added). Because the 1886 lands used an assignment system instead of an allotment system, Congress used the word "family" rather than "heirs," which was used in the 1863 Act. However, in this context, the Indian Land Certificates that implemented the 1888, 1889, and 1890 Acts certified that an assignee "*and his heirs* are entitled to immediate possession of said land." Pls.' Ex. 35 (emphasis added).

The uniformly consistent practice of the Department of Interior over a ninety-year span reinforces the view that lineal descendants are beneficiaries. Upon the death of a landholder, the Department frequently passed the land along to the children. *See, e.g.*, Pls.' Ex. 34, at 22. The 1955 Minneapolis Area Office Indian Affairs Manual claimed that to be eligible for an assignment, an applicant must be "a member of the Mdewakanton Band of Sioux, must have been [a] resident of the State of Minnesota on May 20, 1886, in the actual process of moving to the State of Minnesota, *or the descendant of such resident.*" Pls.' Ex. 25, at 0041046 (emphasis added). Internal memoranda of the Department further support this view. A 1971 memorandum from the Acting Associate Solicitor to the Field Solicitor said that "only descendants of Mdewakanton who resided in Minnesota on May 20, 1886, are eligible for land assignments at Shakopee." Pls.' Ex. 20, at 1. A 1978 memorandum for the Field Solicitor to the

Minneapolis Area Director of the Bureau of Indian Affairs stressed that the 1886 lands are "held for the benefit of a specific class of people *and their descendants.*" Pls.' Ex. 30, at 2. The court has been provided with no evidence contravening these and other similar documentary materials reflecting long-standing practice. In short, the 1888, 1889, and 1890 Acts created a trust, and the beneficiaries are the loyal Mdewakanton and their lineal descendants.

(b) *The 1980 Act.*

The government repeatedly claims that the 1980 Act terminated any trust that existed for the Mdewakanton. *See, e.g.,* Def.'s Mot. to Dismiss at 13-16. This argument fails to acknowledge the actual language of the 1980 Act. When the United States terminated trusts in the past, Congress typically used far more explicit language than that of the 1980 Act. *See, e.g.,* 25 U.S.C. § 677 ("The purpose of this subchapter is to provide for . . . the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said [Ute] tribe."); 25 U.S.C. § 564 ("The purpose of this subchapter is to provide for the termination of Federal supervision over the trust and restricted property of the Klamath Tribe of Indians."). In contrast, the 1980 Act stated that certain lands currently "held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the [1888, 1889, and 1890 Acts] are hereby declared to hereafter be held by the United States" in trust for the communities. 94 Stat. at 3262. The 1980 Act does

not state as its purpose that the trust for the Mdewakanton would be terminated. Furthermore, the government's interpretation is inconsistent with the 1901 Act, which required the consent of the loyal Mdewakanton before the sale of designated land. Such consent is generally required to terminate a trust, and was not received here. *See Restatement (Third) of Trusts* § 65(1). The government's theory also does not explain the existence of a savings clause. Section 3 of the 1980 Act states that nothing in the Act shall "alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act." 94 Stat. at 3262. This language covered more than pre-1980 assignments to lineal descendants. By its terms it saved pre-1980 contracts, leases, and assignments to *non*-descendants, which assignments generated proceeds that were gathered by the Department of Interior and then split among lineal descendants. These omissions indicate that the 1980 Act did not terminate the trust.

In addition, as plaintiffs have pointed out, the language of the 1980 Act implies that the lineal descendants' equitable title was not transferred. The 1980 Act transfers "all right, title, and interest *of the United States*" in the 1886 lands to the United States in trust for the communities. 94 Stat. at 3262 (emphasis added). Because the trust was created by the 1888, 1889, and 1890 Acts for the loyal Mdewakanton, legal title was in the United States but equitable title was held by the loyal Mdewakanton

and their lineal descendants. When the 1980 Act transferred the United States' right, title, and interest in land, that interest appears *not* to have included the equitable title to the 1886 lands, because the 1980 statute stated that the United States was transferring only that interest it possessed before the Act. Furthermore, the sole object of the Act's transfer is the 1886 lands, "including any structures or other improvements of the United States on such lands." *Id.* Notably, this description does not include the monies that were, and are, part of the trust's corpus. This omission further indicates that the trust persists.

The Department of Interior interpreted the 1980 Act to shift the authority to determine the uses of the land from the Department of Interior to the three communities. Repeals by implication are not favored by this court, and when "'two statutes are capable of co-existence, it is the clear duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Liesegang v. Secretary of Veterans Affairs,* 312 F.3d 1368, 1374 (Fed.Cir.2002) (quoting *Horner v. Jeffrey,* 823 F.2d 1521, 1527-28 (Fed.Cir.1987)). Absent an explicitly expressed intention by Congress to terminate the trust, the court will endeavor to reconcile the trust created by the Acts of 1888, 1889, and 1890, as well as the consent requirement in the 1901 Act, with the 1980 Act. For the present, it is enough to conclude that the 1980 Act did not terminate the trust created respecting the 1886 property and that the United

States still retains its powers and obligations as trustee regarding 1886 property.[13]

(c) *Money-mandating duty.*

The government vigorously argues that the United States does not owe a "money-mandating" duty to the plaintiffs. Def.'s Mot. to Dismiss at 10-20. For this court to have jurisdiction over a case, the United States must waive its sovereign immunity; the Tucker Act constitutes such a waiver, but only if the plaintiffs' substantive right comes from another source of law. *See Mitchell II,* 463 U.S. at 216, 103 S.Ct. 2961.

The Supreme Court in *Mitchell II* held that the source of substantive law must "fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Id.* at 218, 103 S.Ct. 2961. Twenty years later, the majority in *White*

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[13] It may be that the 1980 Act created a trust on a trust, but that possibility and others must be remitted to exploration in future proceedings. The 1980 Act is so poorly drafted that it is difficult to make sense of its provisions. In addition, here as in *United States v. Sioux Nation of Indians,* 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980),

> [t]he principles that it "must [be] presume[d] that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that [it] exercised its best judgment in the premises," *Lone Wolf v. Hitchcock,* 187 U.S. 553, 568, 23 S.Ct. 216, 222, 47 L.Ed. 299, are inapplicable in this case.

Id. at 373, 100 S.Ct. 2716.

Mountain Apache stated that "[i]t is enough, then, that a statute creating a Tucker Act right be *reasonably amenable* to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be 'lightly inferred' . . . a fair inference will do." 537 U.S. at 473, 123 S.Ct. 1126 (emphasis added). The Federal Circuit has interpreted *White Mountain Apache* to redefine the test from *Mitchell II:*

> The previous test of 'fairly interpreted as mandating compensation' is now stated as whether the statute in question is 'reasonably amenable to the reading that it mandates a right to recovery in damages'. . . . The new test clearly lowers the threshold for establishing that a statute or regulation is money-mandating, for it replaces a normal 'fairly interpreted' test with a less demanding test of 'reasonable amenability' based on 'fair inferences.'

Fisher v. United States, 364 F.3d 1372, 1377 (Fed.Cir.2004).[14] The government interprets *White*

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[14] A principal divergence between the majority and the dissent in *Fisher* is whether this lower threshold should satisfy both a jurisdictional challenge under RCFC 12(b)(1) and a challenge on the merits under 12(b)(6), or apply only to the jurisdictional inquiry. *Id.* at 1377-78. The majority deferred this question because it was unnecessary to a ruling in the *Fisher* case. *Id.* at 1378. The dissenting judge would have reached the question and decided that the less rigorous test should be applied to the merits as well as to the jurisdictional determination. *Id.* at 1387, 1389-90 (Dyk, J. dissenting).

Mountain Apache to require a two-step inquiry: first, the court decides whether the government owed a duty to the plaintiff, and second, it determines whether the substantive law can be fairly interpreted as mandating compensation where that duty is breached. Def.'s Reply at 15; *see also White Mountain Apache*, 537 U.S. at 479-80, 123 S.Ct. 1126 (Ginsburg, J., concurring). In the present case, the plaintiffs have established that the United States had a money-mandating duty to them.[15]

First, the United States owes a fiduciary duty to the plaintiffs. The previous discussion describes in detail the United States' creation of a trust along with accompanying fiduciary duties. *See supra*, at 540-43. The United States' obligations in this case are more demanding than those in *White Mountain Apache* and *Mitchell II*, in both of which enforceable fiduciary duties were found to exist. *Mitchell II* held that various congressional acts imposed a fiduciary duty on the government regarding timber sales, among other things citing a "1910 Act [that] empowered the Secretary to sell timber on unallotted lands and apply the proceeds of the sales for the benefit of the Indians." 463 U.S. at 220, 103 S.Ct. 2961. That Act is similar to the 1901 Act empowering the Secretary of Interior to sell lands on behalf of the loyal Mdewakanton, provided he acquired their consent.

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[15] This is so regardless of which of the *Fisher* variants of the *White Mountain Apache* standard is applied. *See supra*, n. 14.

Act of Feb. 25, 1901, 31 Stat. 805-06. The court in *Mitchell II* also took account of regulations promulgated by the Office of Indian Affairs, arguing that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians." 463 U.S. at 220, 225, 103 S.Ct. 2961. Similarly, the Minneapolis Area Office for Indian Affairs issued regulations "to provide procedures for the issuing of certificates covering Minnesota Mdewakanton Sioux assignments." Pls.' Ex. 25, at 1. *White Mountain Apache* held that the United States had a money-mandating duty regarding approximately thirty buildings on the former Fort Apache Military Reservation that were held in trust by the United States for the White Mountain Apache Tribe but occupied by the United States. The Supreme Court determined that the government was invested "with discretionary authority to make direct use of portions of the trust corpus. The trust property is subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes." *White Mountain Apache,* 537 U.S. at 475, 123 S.Ct. 1126 (internal quotations and citations omitted). Similarly, the Secretary of Interior had a reasonably well delineated discretion in his or her duties as trustee for the Mdewakanton.

By contrast, in *Navajo Nation,* decided by the Supreme Court on the same day as *White Mountain Apache,* the United States had a much lesser role in managing property. *Navajo Nation* held that the

Indian Mineral Leasing Act (IMLA) did not confer a fiduciary duty upon the United States, emphasizing that "[t]he Secretary is neither assigned a comprehensive managerial role nor, at the time relevant here, expressly invested with responsibility to secure 'the needs and best interests of the Indian owner and his heirs.'" 537 U.S. at 507-08, 123 S.Ct. 1079. In contrast, the 1889 and 1890 Acts called for the Secretary of Interior to allocate the trust corpus "as may be deemed best in the case of each of these Indians or family thereof." Act of 1889, 25 Stat. at 992; Act of 1890, 26 Stat. at 349.[16]

Second, once a duty has been shown, the next question is whether the source of law may "fairly be interpreted as mandating compensation by the Federal Government for the damages sustained."

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[16] Similarly, *Mitchell I* held that the General Allotment Act of 1887 did not impose a fiduciary responsibility on the United States, relying on two key facts: the Indian allottee, rather than the United States, was "responsible for using the land for agricultural or grazing purposes," and the legislative history suggested that no fiduciary duty was meant to be created. 445 U.S. at 542-43, 100 S.Ct. 1349. In the case of the 1886 lands, unlike in *Mitchell I*, the United States assigned the lands as opposed to allotting them; it also was responsible for leasing the lands to others, collecting rents, and dividing the proceeds among the beneficiaries. In *Mitchell I*, respecting the statute at issue, Senator Dawes had explained "that the statute as amended would still ensure that title to the land would be transferred to the Indian allottee at the expiration of 25 years." *Id.* at 543, 100 S.Ct. 1349. No such provision enabled the Mdewakanton to acquire the land after a period of time – it was held in trust.

Mitchell II, 463 U.S. at 218, 103 S.Ct. 2961. Once it has been shown that the government owes a fiduciary duty as a trustee to a group of plaintiffs, mandatory compensation for a breach of that duty is ordinarily a logical and fair interpretation of the underlying statutory provisions. *See, e.g., id.* at 226, 103 S.Ct. 2961 ("Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties."). "[E]lementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." *White Mountain Apache,* 537 U.S. at 475, 123 S.Ct. 1126. In this case also, having found that a fiduciary relationship exists, a money-mandating duty follows as a matter of course. Here, there is additionally a direct statutory predicate for a money-mandating duty. The requirement in the 1889 and 1890 Appropriations Acts that if the funds were not all spent during the fiscal year, they must nonetheless be used to support the Mdewakanton, further indicates that if the proceeds of the trust corpus are not used for the benefit of the Mdewakanton, compensation is appropriate. *See, e.g.,* Act of 1889, 25 Stat. at 992.

Moreover, as the undisputed record shows, this is not a case in which the lineal descendants of the loyal Mdewakanton were provided a substitute for their beneficial interest. In other words, this is *not* a case in which the government sought to invoke "the traditional rule that a trustee may change the form of

trust assets as long as he fairly (or in good faith) attempts to provide his ward with property of equal value." *Sioux Nation,* 448 U.S. at 416, 100 S.Ct. 2716. In short, the United States has breached its fiduciary duties, and the applicable law mandates compensation. However, the record is insufficient to show the nature and extent of the breach of fiduciary duty, and it does not begin to address the posture of individual plaintiffs respecting the breach.

2. Breach of Contract

In addition to their claim of breach of fiduciary duty, the plaintiffs allege that the loyal Mdewakanton formed a contract with the United States in which they agreed to sever their tribal relations, express loyalty to the United States, and move onto the 1886 lands. In exchange, the United States would purchase the 1886 lands and place them in a trust for the Mdewakanton. Am. Com pl. ¶¶ 11-20. Beginning in 1885, John Bluestone allegedly negotiated this contract with Special Agent Walter McLeod. *Id.* ¶ 13; Pls.' Cross-Mot. at 13. The 1886 and 1889 censuses recorded which Mdewakanton were willing to enter the contract by severing their tribal relations. Pls.' Cross-Mot. at 15-16. As plaintiffs would have it, the 1889 and 1890 Acts reflected contract modifications requested by the Mdewakanton. *Id.* at 16-17. By distributing income, profits, and proceeds arising from the 1886 lands to individuals who are not lineal descendants, the United States has allegedly breached its contractual duty to the plaintiffs. Am.

Compl. ¶¶ 52-55. The lineal descendants, as intended beneficiaries of the contract, allegedly have a right to sue for this breach. Pls.' Cross-Mot. at 42.

The government denies the existence of a contract, claiming that "the [1888, 1889, and 1890] appropriations were gratuitous acts by the United States and not contractual obligations." Def.'s Mot. to Dismiss at 21. The government also argues that the plaintiffs fail to plead the contract in sufficient detail, as required by RCFC 9(h)(3) ("If the claim is founded upon a contract or treaty with the United States, [the complaint shall include] a description of the contract or treaty sufficient to identify it."). Def.'s Mot. to Dismiss at 22.

A contract with the government arises only if three requirements are satisfied: (1) mutual intent to contract, including an offer and acceptance; (2) consideration; and (3) a government representative who had actual authority to bind the government. *See La Van v. United States,* 382 F.3d 1340, 1346 (Fed.Cir.2004); *American Fed. Bank, F.S.B. v. United States,* 62 Fed.Cl. 185, 194 (2004). Plaintiffs claim to meet these elements through a contract implied in fact. Pls.' Cross-Mot. at 43. Contracts implied in fact are founded upon a meeting of the minds and inferred from the conduct of the parties. *Algonac Mfg. Co. v. United States,* 192 Ct.Cl. 649, 428 F.2d 1241, 1255 (1970); *American Fed.,* 62 Fed. Cl. at 194. According to the plaintiffs, mutual intent to contract is apparent from the behavior of the respective parties, with the United States' enactment of the 1888, 1889, and 1890

Appropriations Acts and purchasing the 1886 lands, and with the Mdewakanton moving to those lands and severing their tribal relations. Pls.' Cross-Mot. at 43-44. Consideration is allegedly present because the Mdewakanton severed their tribal relations and the United States provided them land. *Id.* at 44. The government representative who allegedly negotiated the contract was United States Special Agents Walter McLeod and, subsequently, Robert Henton, both of whom supposedly had actual authority under the Acts to bind the government. *Id.* at 44-45.

On the facts as pled by the plaintiffs, it is unnecessary to explore in any detail the questions whether a contract exists between the loyal Mdewakanton and the United States or whether the complaint sets out the allegations of contractual formation in sufficient detail because plaintiffs' claim of breach of contract is barred on statute of limitations grounds. *See infra.*

C. Statute of Limitations

The government further argues that the statute of limitations had expired prior to plaintiffs' filing of their complaint. Def.'s Mot. to Dismiss at 22-23. Generally, a plaintiff must file a suit against the government within six years after the claim first accrues. 28 U.S.C. § 2501. This statute of limitations is a jurisdictional limitation on the government's waiver of sovereign immunity and therefore must be construed strictly. *See, e.g., Hopland Band of Pomo Indians v. United States,* 855 F.2d 1573, 1576-77

(Fed.Cir.1988). However, the Indian Trust Accounting Statute quoted *supra,* at 535, must be taken into account in addressing the generally applicable six-year statute of limitations.

The Indian Trust Accounting Statute was analyzed in much detail and with great care in the Federal Circuit's recent decision in *Shoshone Indian Tribe,* 364 F.3d 1339. As *Shoshone* held, the opening phrase "[n]otwithstanding any other provision of law" combined with the statement that the "statute of limitations shall not commence to run on any claim . . . concerning losses to or mismanagement of trust funds" indicates that the specific provisions of the Indian Trust Accounting Statute trump those of 28 U.S.C. § 2501, the general statute of limitations. 364 F.3d at 1346. Second, Congress chose the phrase "shall not commence to run" as opposed to "tolls," meaning that the *beginning* of the limitations period is delayed until an accounting is provided. *Id.* at 1347. Indeed, in this regard, the Indian Trust Accounting Statute resurrects claims that may previously have been barred by the statute of limitations. This interpretation is consistent with principles of trust law, because "[b]eneficiaries of a trust are permitted to rely on the good faith and expertise of their trustees; because of this reliance, beneficiaries are under a lesser duty to discover malfeasance relating to their trust assets." *Id.*

In *Shoshone,* the Federal Circuit interpreted the Indian Trust Accounting Statute to be limited to mismanagement of trust funds and to losses

"resulting from the Government's failure or delay in (1) collecting payments under the sand and gravel contracts, (2) depositing the collected monies into the Tribes' interest-bearing trust accounts, or (3) assessing penalties for late payment." *Id.* at 1350. This limitation led the court of appeals to hold claims of asset mismanagement time-barred: "While it is true that a failure to obtain a maximum benefit from a mineral asset is an example of an action that will result in a loss to the trust, the Act's language does not on its face apply to claims involving trust *assets*." *Id.*

In its supplemental brief in this case, the government challenges *any* applicability of the Indian Trust Accounting Statute.[17] The government asserts that the plaintiffs' claims neither involve a trust nor do they involve trust funds. Def.'s Supp. Br. at 7-10. These claims are unavailing. First, as described previously, a set of closely related appropriation acts of Congress created a trust, and plaintiffs have put at issue the government's role as trustee. Second, as to whether "trust funds" are at issue here, the government completely ignores that the Department of Interior maintained for years 1886 monies in trust

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[17] The government's briefs filed with its motion to dismiss and in response to plaintiffs' cross-motion omitted any mention whatsoever of the Indian Trust Accounting Statute. It was not until the court requested supplemental briefing of the Indian Trust Accounting Statute at the hearing on the cross-motions that the government addressed the Statute and issues arising with its application to this case.

accounts and paid distributions to lineal descendants of loyal Mdewakanton from those accounts. *See supra*, at 533 (quoting the Field Solicitor's letter dated February 6, 1981 to the Area Director, regarding, among other things, disposition of the 1886 monies after enactment of the 1980 Act). Moreover, the Department of Interior has adopted guidelines applicable to the administration by the Bureau of Indian Affairs of "Trust Funds For Tribes and Individual Indians." *See* 25 C.F.R. Chapter I, Part 115. Those guidelines define "[t]rust funds" as "money derived from the sale or use of trust lands, restricted fee lands, or trust resources and any other money that the Secretary must accept into trust." 25 C.F.R. § 115.002. The monies held by the Department before 1980 for lineal descendants of the loyal Mdewakanton certainly fall within that definition. In addition, plaintiffs allege instances where proceeds from activities on the 1886 lands have not been distributed in accord with the terms of the trust, including proceeds from a gravel quarry, a cigarette enterprise, a bingo casino, and the current casinos. Pls.' Supp. Br. at 6-9. These claims respecting proceeds differ from the asset-mismanagement claims at issue in *Shoshone*, which involved contentions that the United States could have secured a better price under certain leases. Trust funds are the focus of the present case. The Mdewakanton claims deal with distribution of proceeds from leasing, not the leasing itself.[18]

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[18] The government argues that the lineal descendants are

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The government also challenges the applicability of the Indian Trust Accounting Statute because the government so openly disavowed any obligations as trustee after 1980. As the government would have it, this blatant repudiation necessarily triggered the statute of limitations such that it now has expired. Def.'s Supp. Br. at 6. The government relies on the Federal Circuit's commentary in *Shoshone* that "[a] trustee may repudiate the trust by express words or by taking actions inconsistent with his responsibilities as trustee." 364 F.3d at 1348. However, this argument by the government ignores a crucial caveat by the court of appeals that followed the clause the government quotes: "[I]t is often the case, however, that the trustee can breach his fiduciary responsibilities of managing trust property without placing the beneficiary on notice that a breach has occurred. It is therefore common for the statute of limitations to not commence to run against the beneficiaries until a final accounting has occurred that establishes the deficit of the trust." *Id.* In addition, as *Shoshone* recognizes, the Indian Trust Accounting Statute constitutes a specific exception to the traditional rules regarding applicability of statutes of limitations to claims of breach of trust. *Id.* at 1348-51. The Indian Trust Accounting Statute categorically applies

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ineligible to receive proceeds from the casinos under the 1988 Indian Gaming Regulatory Act, 25 U.S.C. § 2710. Def.'s Supp. Br. at 9 n.4. At this point, the court need not rule on this issue because the breach of fiduciary duty involves more than the failure to gather and distribute proceeds from the casinos.

"[n]otwithstanding any other provision of law." Thus, the Indian Trust Accounting Statute resuscitates and preserves plaintiffs' claims of breach of trust, displacing 28 U.S.C. § 2501 in the process.

The Indian Trust Accounting Statute does not apply to plaintiffs' contract claim. Because a congressional waiver of a statute of limitations must be strictly construed, *Shoshone* held that the Indian Trust Accounting Statute only applied to trust mismanagement and to specific kinds of losses. *Id.* at 1351. Plaintiffs' breach of contract claims do not fall within either category. Contrary to the plaintiffs' claims, the claims for breach of contract began to accrue in 1981 when the United States transferred the trust corpus to the communities. Lower Sioux *Amicus* Br.App. 4, at 2. The Indian Trust Accounting Statute, because of its explicit scope, cannot save the plaintiffs' contract claim, which expired in 1987.

Plaintiffs raise five additional arguments in an attempt to salvage their contract claim. *See* Pls.' Cross-Mot. at 46-49. First, they argue that the breach of contract has taken place within the last six years. This argument fails because claims begin to accrue when all of the actions necessary to formulate the claim have taken place and the claimant knows or should have known of the claims' existence. *See Kinsey v. United States,* 852 F.2d 556, 557 n.* (Fed.Cir.1988). The United States' refusal to assign lands or send trust proceeds to lineal descendants who did not belong to the communities should have made plaintiffs aware of the alleged breach of

contract. Second, and relatedly, they invoke the continuing-claim doctrine. The continuing-claim doctrine "operates to save parties who have pled a series of distinct events – each of which gives rise to a separate cause of action – as a single continuing event." *Ariadne Fin. Servs. v. United States,* 133 F.3d 874, 879 (Fed.Cir.1998). The documentary materials before the court include a letter from the Field Solicitor stating that the 1886 monies would be transferred to the communities in light of the 1980 Act: "It is my understanding that the apportioned share belonging to or identified for the Shakoppee [*sic*] Community has already been turned over to that group. Similar action should be taken as to the other two communities claiming an interest in these monies." Lower Sioux *Amicus* Br.App. 4, at 2 (Letter from Elmer T. Nitzschke to Edwin Demery (Feb. 6, 1981) (quoted more fully *supra,* at 533)). This distribution to the communities appears to have taken place in 1981. Since then, the alleged default consists of a failure to gather and segregate 1886 monies and to hold them for the lineal descendants.

Third, the plaintiffs claim they did not have adequate notice because the United States insisted that the lineal descendants did not have title. These very statements, however, should have given them notice that the United States was repudiating its alleged contractual duties. Fourth, they request that the court apply equitable tolling to save their contractual claim. Equitable tolling is applied "sparingly" and usually when "the claimant has actively pursued

his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990). No evidence of such misconduct has been provided. Fifth, plaintiffs claim that Count III, which repeats the claims of breach of contract on behalf of minors, was tolled until three years after the minors reached majority age. This argument fails because, as described above, any alleged breach of contract took place in 1981 at the latest. Eighteen years is the age of majority in Minnesota. *See* Minn.Stat. § 645.451. The applicable statute of limitations, 28 U.S.C. § 2501, treats children as if they were legally unable to file suit and allows filing within three years after a child reaches majority status. The latest date anyone who had a claim at the time of breach could have turned eighteen is 1999, assuming the breach took place in 1981, and the additional three years gave such a young adult until 2002 to file. This claim was filed in 2003, so the minors' contract claims are time-barred as well.

For the foregoing reasons, plaintiffs' claims of breach of contract are dismissed.

D. The Menominee Tribe Exception

As a final jurisdictional issue, the court raises *sua sponte* the question of whether plaintiffs' suit is

barred by *Menominee Tribe v. United States*, 221 Ct.Cl. 506, 607 F.2d 1335 (1979). In *Menominee Tribe*, the Court of Claims was concerned with a statute terminating a trust for the benefit of the Menominee Tribe. In that context, the court held that it lacked jurisdiction over claims of breach of fiduciary duty when the alleged breach consisted of an act of Congress within Congress's constitutional powers. *Id.* at 1344 ("[W]hen the valid acts of Congress itself are assailed as unjust, unfair, in bad faith, or blind to the Indians' interest – in a case not raising a constitutional claim – we do not believe that Congress intended in sections 1491 or 1505 to repose that unusual authority . . . in this court."). In *Menominee Tribe*, the Court of Claims conceded that a federal agency or official could render the United States liable for breach of fiduciary duty, but it rejected the proposition that an act of Congress could do so, or at least that Congress would not have intended to waive the government's sovereign immunity against suit in such circumstances. *Id.* at 1340. The present case is distinguishable from *Menominee Tribe* because here it was the *Department of Interior* that allegedly breached its duty to the lineal descendants, not Congress. As discussed previously, the 1980 Act did not by its terms terminate the trust for the benefit of the lineal descendants of the loyal Mdewakanton. Although the 1980 Act is hardly a model of good legislative drafting, it only conveyed to the communities that title which the United States previously possessed, and the United States had only a bare legal title as trustee because the equitable title

belonged to the lineal descendants. Moreover, because the 1980 Act concerned only title to land, it did not address the 1886 monies in any respect. Consequently, the Department of Interior's distribution of trust funds consisting of monies derived from the 1886 lands allegedly violated its obligations under the trust created by the 1888, 1889, and 1890 Acts of Congress.

Menominee Tribe also abjured any jurisdiction over executive actions implementing congressional acts that would be deemed a breach of fiduciary duty. *Menominee Tribe*, 607 F.2d at 1345 ("Unless the Department violated the Constitution or some outstanding directive of Congress, the United States cannot be held liable for Interior's affirmative actions or passive omissions with respect to the passage and implementation of the Termination Act."). In the present case, the Department violated the directives of Congress to serve as a trustee for the lineal descendants. The Department of Interior may have been relying on a misinterpretation of the 1980 Act when it transferred 1886 monies to the communities and thereafter failed to gather, hold, and distribute proceeds from the beneficial use of the 1886 lands, but this reliance does not change its breach of the duties imposed on it by earlier acts of Congress.

In short, the *Menominee Tribe* exception does not operate to divest this court of jurisdiction it otherwise would have under the Tucker Act and the Indian Tucker Act to consider plaintiffs' claims of breach of trust. Even if *Menominee Tribe* remains good law, the

alleged breach in this case does not stem from a constitutional act of Congress that terminated a trust.

Moreover, the court is well aware that *Menominee Tribe* may well have been overruled by the Supreme Court's decisions in *Mitchell II* in 1983 and *White Mountain Apache* in 2003. In *Menominee Tribe,* the Court of Claims was reluctant to find that the United States had waived its sovereign immunity over a claim of breach of a fiduciary duty that stemmed from a statute terminating a trust for the benefit of Indians. *See, e.g.,* 607 F.2d at 1342 ("[I]t has also been established for at least seventy years that Congress has the unilateral and plenary power . . . to abrogate or modify, by statute, a prior treaty with Indians."). Even though the Court of Claims in *Menominee Tribe* conceded that the texts of both the Tucker Act and Indian Tucker Act would have permitted suit, the "historical treatment of consents to Indians to sue the sovereign in this court" justified a limiting interpretation of these Acts. *Id.* Notably, *Mitchell II* was decided by the Supreme Court only three years after *Menominee Tribe,* and *Mitchell II* discerned no impediment in either the Tucker Act or the Indian Tucker Act to this court's jurisdiction to consider claims of breach of fiduciary duty, however such claims might arise.

In *Mitchell II,* the Supreme Court concluded that the Tucker Act and the Indian Tucker Act constituted the government's waiver of sovereign immunity and that no further, or second, waiver of sovereign

immunity was needed for this court to have jurisdiction over a claim of breach of fiduciary duty. Further, what was needed was a source of substantive law that could be "fairly . . . interpreted as mandating compensation by the Federal Government for the damages sustained," creating a money-mandating duty. 463 U.S. at 218, 103 S.Ct. 2961. *White Mountain Apache* reaffirmed this interpretation of the Tucker Act and the Indian Tucker Act, and arguably eased somewhat the showing required to establish a money-mandating duty. *See supra,* at 544. In short, *Mitchell II* and *White Mountain Apache* negated the premise of *Menominee Tribe* by concluding that there was no basis for a constrained interpretation of the statutory waiver of sovereign immunity in the Tucker Act and Indian Tucker Act, at least in Indian trust cases.[19] Finally, even if *Mitchell II* and *White Mountain Apache* left any doubt that the

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[19] After *Mitchell II, Navajo Nation*, and *White Mountain Apache*, a commentator concluded that the focus was no longer on sovereign immunity in Indian trust cases but rather on a substantive money-mandating source of law:

> [W]hile a party still must find a substantive money-mandating source of law for a claim beyond the Tucker Act, the party need not find a separate waiver of sovereign immunity elsewhere; nor is the interpretation of that proposed source of substantive law subject to the strict construction rule that otherwise controls the threshold determination of whether the government has waived immunity.

Gregory C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity*, 39 Tulsa L.Rev. 313, 335 (2003).

Menominee Tribe exception no longer was viable, the Indian Trust Accounting Statutes should dispel any such residuum. The Indian Trust Accounting Statutes reveal a congressional willingness to resuscitate, preserve, and enable suits against the government as trustee. The Court of Claims' 1979 decision in *Menominee Tribe* does not constitute a jurisdictional bar to this suit.

Partial Summary Judgment

Plaintiffs' cross-motion for partial summary judgment focuses on three issues: whether the lineal descendants are the trust beneficiaries of the 1886 lands, whether the United States has breached its fiduciary duties, and whether the government has breached its contractual duties. Pls.' Cross-Mot. at 1. This motion is granted in part and denied in part. As the preceding analysis shows, the plaintiffs are entitled to a partial summary judgment that a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus. This trust was not extinguished by the 1980 Act, and the statute of limitations does not bar plaintiffs' claim of breach of fiduciary duty because of the Indian Trust Accounting Statute.[20] The

[20] At this early stage of the case, plaintiffs rest on allegations that they are lineal descendants of the loyal Mdewakanton. Future proceedings will be held to determine whether

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undisputed record also shows that the government breached its fiduciary duties respecting the trust, and partial summary judgment is appropriate in this respect as well.

Plaintiffs' motion is otherwise denied. The record is incomplete as to the extent of the breach by the government of its fiduciary duties. No accounting has been rendered. No inventory of funds and lands constituting the corpus has been made, and plaintiffs who belong to a community may have received benefits. Because plaintiffs include members of each of the three communities as well as non-members, individual plaintiffs may differ insofar as they have suffered injury from the breach. Hr'g Tr. at 47-49. Entry of partial summary judgment in favor of plaintiffs thus does not extend beyond a conclusion that the government has as a general matter breached its fiduciary duties under the trust created for the loyal Mdewakanton and their lineal descendants. Lastly, because the contract claims are being dismissed on

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plaintiffs satisfy their burden of proof on this factual issue. The government argues that the plaintiffs have produced insufficient evidence to prove their standing at the summary judgment stage. *See* Def.'s Reply at 20 (citing *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (holding that for a summary judgment, unlike for resisting a motion to dismiss, plaintiffs must set forth "specific facts" establishing the court's jurisdiction)). Here, the plaintiffs have produced undisputed evidence that supports standing to obtain a partial summary judgment with respect to their claims of breach of fiduciary duty.

statute of limitations grounds, summary judgment cannot be entered on those claims.

Accordingly, plaintiffs' cross-motion for partial summary judgment is granted in part and denied in part.

Amendment of the Complaint

Plaintiffs have moved for leave to file a Second Amended Complaint to add both additional named and anonymous plaintiffs. Plaintiffs have also moved for an order protecting the identities of the anonymous plaintiffs. By the proposed amendment, the total number of plaintiffs would be raised to more than 500. Pls.' Mot. for Leave to Amend Compl., Attach. A at I. The original complaint named 134 individual plaintiffs, and the First Amended Complaint increased the total number of named plaintiffs to 251. Plaintiffs' request for anonymity pertains to alleged lineal descendants who are currently members of a community and are concerned that their participation would be viewed as adverse to the communities and would risk termination of their membership or who are applying for membership to communities and are concerned they would be denied admission if the communities learn of their participation in this case. Hr'g Tr. at 88-89.

Plaintiffs' motion to amend their complaint raises procedural issues of joinder and public access to

judicial proceedings.[21] All of the prospective additional plaintiffs must satisfy the requirements of permissive joinder before they can join in this action. In addition, respecting the request of some plaintiffs for anonymity, the court must balance their need for anonymity against potential prejudice to the government and the public's interest in knowing their identity. For its part, the government represents that it does not oppose plaintiffs' request to add additional named plaintiffs, but it does object to plaintiffs' requests to add anonymous plaintiffs and for a protective order. Def.'s Resp. to Pls.' Mot. for Leave to Amend Compl. at 1.

A. Additional Plaintiffs

Adding additional individual plaintiffs who allegedly are lineal descendants of the loyal Mdewakanton raises the same issue of joinder as that which arises with the individuals who are currently named as plaintiffs. The pertinent rule, RCFC 20(a), provides that "[a]ll persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the

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[21] It also engenders concerns about potential class-certification proceedings and notice to potential additional parties. These additional questions are addressed in the closing portions of this opinion.

action." Individual plaintiffs must satisfy the requirements of this Rule.

First, all of the plaintiffs would be jointly asserting claims for breach of the same fiduciary duty. As specified in their complaint, the plaintiffs claim to sue as individuals "on behalf of themselves and all other descendants of persons listed on the May 20, 1886 U.S. Mdewakanton census." Am. Compl. ¶ 2. The court construes this language to mean that the named plaintiffs are asserting their claims jointly and severally, and as representatives of a potential class comprised of four subclasses. *See supra,* at 534. Thus, all of the prospective plaintiffs would be asserting a right to relief jointly and severally, and, in addition, their claims arise out of the same transaction or occurrence, *viz.*, the trust created by the appropriations statutes enacted in 1888, 1889, and 1890. In that regard, the plaintiffs' relationship satisfies the first element of Rule 20(a).

The plaintiffs' circumstances in this case are readily distinguishable from the misjoined plaintiffs addressed by the recent decision in *Franconia Associates v. United States,* 61 Fed.Cl. 335 (2004). In that case, a number of property owners sued the United States for breach of loan agreements, but each plaintiff had entered into a separate agreement. The plaintiffs in *Franconia* did not meet the first requirement of RCFC 20(a) because, although their claims shared common legal and factual issues, the claims did not arise out of the *same* transaction or occurrence. *Id.* at 337.

Second, in this case there are questions of law or fact that would be common to all of the plaintiffs. This requirement "is usually easily satisfied, particularly since there must be only one such overlapping question." *Id.* at 336. Here, all or most of the legal issues would be common to the plaintiffs, as would many of the factual issues.

In sum, permissive joinder of additional lineal descendants of the loyal Mdewakanton is proper under RCFC 20(a), and, accordingly, plaintiffs are granted leave to file a Second Amended Complaint to add such plaintiffs.

B. Anonymous Plaintiffs

RCFC 10(a) provides that the title in a complaint "shall include the names of all the parties." The use of pseudonyms in a complaint is contrary to this requirement. Consequently, courts allow parties to proceed anonymously only where unusual circumstances justify concealing a party's identity. *See Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067 (9th Cir.2000) (collecting cases). Five federal courts of appeals that have reviewed a trial court's denial of a party's request to proceed anonymously have instructed trial courts to balance the competing interests involved. *See id.* at 1068; *M.M. v. Zavaras*, 139 F.3d 798, 803-04 (10th Cir.1998); *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir.1993); *Doe v. Frank*, 951 F.2d 320, 323-24 (11th Cir.1992); *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir.1981). Specifically,

these circuits have held that a trial court should weigh the party's need for anonymity against the general presumption that parties' identities be available to the public and the likelihood of prejudice to the opposing party. *Advanced Textile,* 214 F.3d at 1068 (citations omitted).

The Ninth Circuit has drawn from these precedents five factors to guide a trial court's inquiry into the need for anonymity where the party seeking anonymity is relying on a fear of retaliation: "(1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears; and (3) the anonymous party's vulnerability to such retaliation." *Id.* (internal citations omitted). In addition, the court must determine (4) whether disclosure of the party's identity would best serve the public interest. *Id.* at 1068-69 (citing *Stegall,* 653 F.2d at 185, and observing that "'[p]arty anonymity does not obstruct the public's view of the issues joined or the court's performance in resolving them.'"). Finally, and importantly, "[t]he court must also determine [5] the precise prejudice at each stage of the proceedings to the opposing party, and whether proceedings may be structured so as to mitigate that prejudice." *Id.* at 1068 (citing *James,* 6 F.3d at 240-41).

The plaintiffs aver that certain alleged lineal descendants, including both those who are currently members of a community and those who are applying for membership in a community, would face retaliation by their respective community. Hr'g Tr. at 88-89. The government asserts that plaintiffs have not made

a compelling showing in support of their request for anonymity. Def.'s Resp. to Pls.' Mot. for Leave to Amend Compl. at 2-3.

Respecting the severity of a threatened harm in general, some courts have opined that "some embarrassment or economic harm is not enough," but rather, "[t]here must be a strong social interest in concealing the identity of the plaintiff." *Doe v. Rostker,* 89 F.R.D. 158, 162 (N.D.Cal.1981) (citing *Lindsey v. Dayton-Hudson Corp.,* 592 F.2d 1118, 1125 (10th Cir.1979)). "The common thread running through these cases [addressing requests by plaintiffs for anonymity] is the presence of some social stigma or the threat of physical harm to the plaintiffs attaching to disclosure of their identities to the public record." *Rostker,* 89 F.R.D. at 161.

In all events, for purposes of supporting their request for leave to add anonymous plaintiffs, the plaintiffs in the instant case have established that the threatened harm justifies their request. The anonymous plaintiffs not only risk economic harm through the loss of per-capita payments but also risk loss of membership in the communities in which they are, or are seeking to become, members. Plaintiffs' fears are reasonable because the communities oppose this lawsuit both jurisdictionally and on the merits, and the community governments possess nearly a plenary power over community membership. *See* Pls.' Opp'n to *Amicus* App. Ex. 9, at 2 (Prairie Island Const. art. III, §§ 4-5); *id.,* Ex. 10, at 2 (Lower Sioux Const. art. III, §§ 4-5); *id.,* Ex. 13, at 1 (Shakopee

Const. art. II, §§ 1(c), 2). Finally, lineal descendants who are either members or seeking to become members of Shakopee and Prairie Island Communities are particularly vulnerable to retaliation because they are minorities in those communities. Hr'g Tr. at 89-90.

Against plaintiffs' need for anonymity must be balanced the risk, if any, of unfairness to the government. The government asserts that pseudonyms would make difficult the task of verifying the identity, tribal membership, and ancestry of each anonymous plaintiff. The government contends that it may have to consult numerous government agents and possibly the communities themselves to obtain evidence of ancestry. Def.'s Resp. to Pls.' Mot. for Leave to Amend Compl. at 1-2. This contention is without merit. Respecting the participation of government agents in the verification of plaintiffs' lineage, all such government agents would be subject to an appropriate protective order. Those government agents would be provided with a list containing each pseudonym and corresponding true name and would be required to maintain the confidential nature of the information contained in that list. Moreover, the government could simply obtain membership lists from the communities and cross-check those lists with the list provided by plaintiffs. The government has not shown that it will be prejudiced by the addition of anonymous plaintiffs at this preliminary stage in proceedings. In this regard, it is instructive that "the balance [among the factors] . . . may change as the

litigation progresses." *Advanced Textile,* 214 F.3d at 1069.

> In cases where the plaintiffs have demonstrated a need for anonymity, the district court should use its powers to manage pretrial proceedings, *see* Fed.R.Civ.P. 16(b), and to issue protective orders limiting disclosure of the party's name, *see* Fed.R.Civ.P. 26(c), to preserve the party's anonymity to the greatest extent possible without prejudicing the opposing party's ability to litigate the case. It may never be necessary, however, to disclose the anonymous parties' identities to nonparties to the suit.

Id.

There also is no indication at this time that the public's interest in the case would best be served by requiring that all of plaintiffs' identities be disclosed. More than 250 plaintiffs are named. In the circumstances at hand, the public's interest is not unduly impaired when some additional similarly-situated plaintiffs proceed anonymously. *See Stegall,* 653 F.2d at 185. This result also accords with the practice of the Bureau of Indian Affairs in providing anonymity to loyal Mdewakanton who are involved in membership disputes with one of the communities. *See supra,* at 530 (citing Pls.' Ex. 33 (Letter from Bureau of Indian Affairs, Midwest Regional Office to Anonymous Mdewakanton (Aug. 20, 2001))).

For these reasons, the plaintiffs are granted leave to file a Second Amended Complaint that

includes some anonymous plaintiffs. An appropriate protective order will be issued at a later date.

Future Proceedings Respecting Class Certification

Despite the class allegations in this case, at the hearing on the pending motions, plaintiffs' counsel represented that he was unsure of his intentions at that time with respect to moving for certification of the class. *See* Hr'g Tr. at 86-87.

RCFC 23, unlike its counterpart in the federal rules, "contemplates only opt-in class certifications, not opt-out classes." RCFC 23 Rules Committee Note, 2002 Revision; *see also Taylor v. United States,* 41 Fed.Cl. 440, 448 (1998) ("While the district courts regularly certify class actions on an opt-out basis, the Court of Federal Claims has traditionally applied an opt-in approach to class actions."). This court applies the criteria for certifying a class set out in *Quinault Allottee Association v. United States,* 197 Ct.Cl. 134, 453 F.2d 1272 (1972). *See* RCFC 23 Rules Committee Note, 2002 Revision. The *Quinault Allottee* criteria are that:

> (1) members must constitute a large but manageable class; (2) there is a question of law common to the whole class; (3) a common legal issue overrides separate factual issues affecting individual members; (4) claims of the party plaintiffs are typical of claims of the class; (5) the Government must have acted on grounds generally applicable to the whole class; (6) the claims of many claimants

> must be so small that it is doubtful they would be otherwise pursued; (7) the party plaintiffs must adequately and fairly protect the interests of the class without conflicts of interest; and (8) the prosecution of individual lawsuits must create a risk of inconsistent or varying adjudications.

Taylor, 41 Fed.Cl. at 445 (citations omitted).

Although in this case, the large number of plaintiffs already named may constitute the functional equivalent of an opt-in class, a potential problem arises as to notice to those lineal descendants who are not named as plaintiffs. *Cf. id.* at 448 (Because "the opt-in procedure amounts to little more tha[n] a permissive joinder rule[,] . . . [i]t is . . . of limited use in informing potential class members of the suit and the claimants' right to join the suit."). The record does not indicate the extent to which such notice has been accomplished. Thus, the court must reserve for further proceedings the issues respecting class certification and notice. If class certification is sought, the notice provisions of RCFC 23(c)(2)(B) will apply, and notice will be effected in accord with those provisions. If plaintiffs do not move to certify a class or subclasses,[22] they shall propose to the court a procedure for providing notice to all lineal descendants who are

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[22] RCFC 23(c)(4)(B) provides that "a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

not named as parties in this action in accord with RCFC 14(b).[23] *See also Hoffmann-La Roche Inc. v. Sperling,* 493 U.S. 165, 170, 171, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989) (a federal trial court has a responsibility to oversee joinder of additional parties in an orderly manner); RCFC 83(b) (courts may "regulate practice in any manner consistent with federal law or rules"). On or before January 10, 2005, plaintiffs shall either move for class certification or they shall propose means of providing notice in compliance with RCFC 14(b).

In light of the court's resolution of the dispositive motions, the government shall inform the court whether it seeks to request that summons be issued pursuant to RCFC 14(a).[24] Such notice or motion shall be filed with the court on or before February 10, 2005.

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[23] RCFC 14(b) provides in part as follows:

(b) *Notice to Interested Parties.*

(1) The court, on its own motion or on the motion of a party, may notify any person with legal capacity to sue and be sued and who is alleged to have an interest in the subject matter of any pending action. Such notice shall advise of the pendency of the action and of the opportunity to seek intervention and to assert an interest in the action.

Potential Summons under RCFC 14(a)

[24] RCFC 14(a)(1) provides that "[o]n motion of the United States, the court may summon any third person against whom the United States may be asserting a claim or contingent claim for the recovery of money paid by the United States in respect of the transaction or matter which constitutes the subject matter of

(Continued on following page)

CONCLUSION

For the reasons stated, the court denies the government's motion to dismiss this action respecting counts I (trust mismanagement) and IV (claim for attorney's fees). The court, however, grants the government's motion to dismiss count II (breach of contract) and the contract claims in count III (separately-pled claims of minor class plaintiffs). The trust mismanagement claims of count III are deemed to be subsumed within count I.

The court grants plaintiffs' cross-motion for partial summary judgment that (1) a trust was created in connection with and as a consequence of the 1888, 1889, and 1890 Appropriation Acts for the benefit of the loyal Mdewakanton and their lineal descendants, which trust included land, improvements to land, and monies as the corpus, (2) such trust was neither extinguished nor terminated by the 1980 Act, and (3) such trust was breached by the United States through actions taken in December 1980 and thereafter. The court otherwise denies the plaintiffs' motion for partial summary judgment.

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the suit to appear as a party and defend the third party's interest, if any, in such a suit."

The notice should also address this court's jurisdiction. *Compare United States v. Wurts,* 303 U.S. 414, 415-16, 58 S.Ct. 637, 82 L.Ed. 932 (1938); *DiSilvestro v. United States,* 405 F.2d 150, 155 (2d Cir.1968); *and* 28 U.S.C. §§ 1503, 2508, *with Barrett Ref. Corp. v. United States,* 242 F.3d 1055, 1062 (Fed.Cir.2001). *See generally Bank One, Michigan v. United States,* 62 Fed. Cl. 474, 477, No. 01-325C (July 31, 2003).

Plaintiffs' motion for leave to file a Second Amended Complaint is granted, as is plaintiffs' motion for leave to include anonymous plaintiffs. Plaintiffs' Second Amended Complaint shall be filed on or before January 10, 2005. A separate protective order will be issued respecting anonymous plaintiffs.

The motions to participate as *amici curiae* filed by the Lower Sioux Indian Community in Minnesota, the Shakopee Mdewakanton Sioux (Dakota) community, the Prairie Island Indian Community in Minnesota, and Raymond Cermak, Sr. are granted. The participation by *amici curiae* shall be limited to filing briefs.

On or before January 10, 2005, plaintiffs shall either file a motion for certification of a class and subclasses, or they shall file a proposed means of providing notice to interested parties pursuant to RCFC 14(b). On or before February 10, 2005, the government shall file a notice informing the court whether it seeks to request that summons be issued pursuant to RCFC 14(a).

IT IS SO ORDERED.